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TREATY WITH CANADA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

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Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany Treaty Doc. 100-14]

The Committee on Foreign Relations, to which was referred the Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, with Annex, signed at Quebec City on March 18, 1985, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof.

BACKGROUND

The negotiation of mutual legal assistance treaties [MLAT's], treaties designed to obtain evidence from abroad, represents a relatively new development in the area of international law enforcement. Negotiations on the first MLAT began over 17 years ago in response to increasing evidence that Swiss banks were being used to launder and hide organized crime money. In 1973, an MLAT between the United States and Switzerland was signed; it entered into force in 1977. In the first 8 years in force, over 300 requests from the United States had been handled by Swiss authorities. The treaty clearly has been and continues to be a assistance to American officials, but an extensive right of appeal available to those affected by American requests and the Swiss refusal to permit information provided by them to be used in tax evasion prosecutions have rendered the treaty less than a perfect instrument.

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Since the MLAT with the Swiss entered into force, MLAT's with the Netherlands, Turkey, and Italy have entered into force, as have a number of executive agreements in the same vein with the Cayman Islands, the British Virgin Islands, Montserrat, Anguilla, Turks and Caicos, Haiti, Nigeria, and the United Kingdom. Generally speaking, executive agreements have been limited to narcotics cases and have served as the first step toward agreement on a more expansive mutual assistance treaty. In addition, MLAT's have been negotiated with Colombia and Morocco, but each has been ratified by the United States only. At the present time, MLAT's with Canada, Thailand, the Bahamas, the Cayman Islands, Mexico, and Belgium have been signed but not yet ratified by the United States.

The traditional procedure for obtaining evidence from foreign countries is by the cumbersome, time-consuming and extremely limited process of letters rogatory, a process whereby written requests from the court of one country to the court of another asking the receiving court to provide evidence or some other form of assistance are made. Letters rogatory have been found lacking in that: (1) they fail to have the element of compulsion; (2) they produce evidence which is inadmissible in the requesting country's courts; and (3) the requested nation often lacks sufficient political will or incentive to comply with the other country's request.

MLAT's are a significantly more effective means of obtaining legal assistance. An MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases. An MLAT, either by itself or in conjunction with domestic implementing legislation, can provide a means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale narcotics trafficking operations. In an MLAT, the United States has the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts. Such procedures would include the use of certificates needed to admit foreign business records, or the opportunity for adequate direct and cross-examination of witnesses in depositions taken abroad. Finally, MLATs are designed to streamline and make more effective the the process of obtaining evidence. Each treaty provides for a Central Authority, the Justice Departments of the two countries, which is responsible for making and executing requests under the treaty.

MLAT's should add an element of standardization and unformity to criminal procedures worldwide. The ability of criminals to hide the evidence and fruits of their crime will be diminished with the enhancement of the capacity of law enforcement agencies to cooperate across national boundaries in the investigation and prosecution of those crimes.

The United States and Canada have a longstanding tradition of cooperation in criminal justice matters. The United States law enforcement community has long known that it could look to Canada for assistance, and that assistance would generally be granted. However, assistance was sometimes prohibited by Canadian law which provided that its courts had authority to order production of documents or examination of witnesses for a foreign country only if the court were satisfied that the evidence produced would be used

at trial and that it was not sought solely for the purpose of furthering the investigation. This law thwarted U.S. efforts to investigate and prosecute certain cases. In those instances, the United States was often forced to resort to serving subpoenas for documents located in Canada on the United States branches of institutions doing business in both countries. Canada viewed these subpoenas as intrusions on its sovereignty but recognized that the United States had no alternative in those cases where Canada was prevented by its law from assisting the United States.

On March 19, 1985, the United States and Canada signed the Treaty on Mutual Legal Assistance in Criminal Matters. This treaty, together with the Canadian implementing legislation, when adopted, will remove the legal barrier and obligate Canada to provide assistance at the investigative stage. Likewise, it will diminish considerably the need for the United States to issue or enforce subpoenas for documents and records located in Canada.

PURPOSE

The treaty provides for assistance in the "investigation, prosecution and suppression of offences", thereby obligating assistance at the investigative stage (such as grand jury proceedings), as well as after formal charges have been filed. An offense within the scope of the treaty, for the United States, is an offense punishable by imprisonment for 1 year or more; for Canada, all serious offenses in the Canadian federal criminal code, or a serious provincial offense (relating to violations of securities, wildlife protection, environmental protection, and consumer protection laws) are included in the Annex.

The treaty establishes the principle that assistance is available without regard to "dual criminality."

The kinds of assistance provided for under the treaty include but are not necessarily limited to: taking testimony and statements; obtaining documents, records and evidence; and executing requests for searches and seizures.

COMMITTEE COMMENTS

The committee believes that Mutual Legal Assistance Treaties (MLAT's) are a key element in the U.S. strategy to improve international cooperation against crime, particularly narcotics-related offenses such as RICO, CCE, and money laundering. There is no country with which we have more extensive or more productive law enforcement cooperation than with Canada. The MLAT with Canada will facilitate certain forms of legal cooperation, particularly at the pre-indictment stage, and ease frictions caused by U.S. subpoenas of documents located in Canadian branches of firms doing business in both countries.

During committee consideration of the Treaty with the Government of Canada, as well as the other five pending MLAT's, concern was expressed that the bilateral treaties could in some manner abridge the constitutional rights of U.S. citizens. A reservation was proposed to each of the MLAT's asserting that "nothing in this treaty requires or authorizes legislation or other action by the

United States of American prohibited by the Constitution of the United States as interpreted by the United States."

The U.S. Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty, "*Reid* v. *Covert,* 354 U.S. 1, (1957). Thus, the committee viewed the proposed reservation as unnecessary. As a matter of domestic law, the Constitution necessarily circumscribes the government's authority to act, and the courts could invalidate any unconstitutional action taken pursuant to the treaties whether or not such reservation were included in the instrument of ratification.

None of the MLAT's requires or authorizes legislation or other action which is prohibited by the Constitution, nor could they properly do so. The reservation thus adds nothing in the way of constitutional protection.

In addition, our treaty partners might well object because it is passed as a reservation with respect to our intended implementation of the treaty and will be expressly included in the instrument of ratification. Each of our treaty partners would have to accept it. Some of the pending six might not, and others with whom the United States wants to negotiate in the future may decline to do so if such a reservation is added at the time of ratification. More likely, some might insist on adding a reciprocal reservation, and that could limit the usefulness of the treaty for our purposes since constitutional limitations have different effects in different legal systems.

The reservation also raises dangerous litigation risks. It could provide a target for defendants as well as the targets of investigations to interpose specious challenges to MLAT requests where they could not now do so. They could also in effect substitute the actions of a foreign government for our own constitutional requirements when they carry out an MLAT request in their own country by permitting defendents to move to exclude evidence produced under an MLAT request because the procedure followed by the foreign govenment did not comport with those required by the Constitution.

Finally, the reasons why a similar reservation was adopted with regard to the Genocide Convention are inappropriate here. Unlike the Genocide Convention, the MLAT's do not create new grounds for which U.S. citizens can be tried. Instead, they establish mechanisms by which evidence can be obtained overseas in a form admissible in U.S. courts through such means as service of process, taking of testimony, admission of documentary evidence such as bank records, and the execution of requests for searches and seizures.

These are essentially procedural matters, already well regulated by the courts. In roughly a decade's experience under the existing MLAT's, no significant constitutional questions have arisen that would require inclusion of the reservation.

Finally, concern was raised that defendants in criminal cases are explicitly excluded from use of the Mutual Legal Assistance Treaties. The committee notes that nothing in this treaty is intended to negate the authority of the Court to ask the prosecution to make request for information under the treaty.

COMMITTEE ACTION

On April 20, 1988, the committee held its first hearing on the six treaties relating to mutual legal assistance in criminal matters with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas, and Thailand. Testimony was heard from Administration witnesses, Mary V. Mochary, Principal Deputy Legal Advisor, Department of State, and Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice.

On June 14, 1988 the committee held another hearing at which the following public witnesses presented testimony:

Mr. Bruce Zagaris, Attorney, Berliner & Maloney, Washington, DC.; Mr. Robert L. Pisani, Executive Director, International Legal Defense Counsel, Philadephia, PA; Mr. Philip White, Attorney, Adam, McCullough & Beard, Washington, DC. The hearing record on this treaty as well as the other five MLAT's is printed as an appendix to the committee report on the Treaty with the Cayman Islands (Treaty Doc. 100–8).

The committee met to consider the Treaty between the Government of the United States of America and the Government of Canada on Mutual Assistance on September 27, 1988. Senator Helms offered a reservation to each of the pending treaties asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The Helms reservation to all the treaties was defeated by a 3–15 vote with Senators Helms, Pressler, and Trible voting in the affirmative and Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Murkowski, Evans, and McConnell voting in the negative.

The committee voted by voice vote with a quorum present to report favorably the treaty with a resolution of ratification to the Senate for its advice and consent.

SECTION-BY-SECTION ANALYSIS

The following technical analysis, which was prepared by the U.S. negotiating team, constitutes the formal executive branch representation as to the meaning of this treaty and the obligations to be assumed by the United States under it:

(8)

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

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TECHNICAL ANALYSIS
MUTUAL LEGAL ASSISTANCE TREATY BETWEEN UNITED STATES AND CANADA

INTRODUCTION

The United States and Canada have a longstanding tradition of cooperation in criminal justice matters unique among nations of the world. The United States law enforcement community has long known that it could look to Canada for help and that the Canadians stood ready and willing to provide assistance. But, unfortunately, assistance was sometimes forbidden by Canadian law which provided that its courts had authority to order production of documents or examination of witnesses for a foreign country only if the court were satisfied that the evidence produced would be used at trial and that it was not sought solely for the purpose of furthering the investigation. Generally, that meant that assistance could be granted only after charges were filed and not while the case was before a grand jury or otherwise still at the investigative stage.[1*] This rule thwarted U.S. efforts to investigate and prosecute certain cases. It also meant unequal treatment since the United States provided assistance without regard to whether the case was pre- or post-indictment.[2]

The United States resorted to judicious "self help" to complete investigations when Canadian assistance was not available. A method used with some frequency to obtain documents needed as evidence located in Canadian branches of institutions doing business in both countries was that of serving subpoenas for the documents on the U.S. branches. Canada viewed these "Bank of Nova Scotia" subpoenas, as they came to be known,[3] as intrusions on its sovereignty but, recognized that the United States would continue to use them in those cases where Canada was prevented by its law from assisting the United States.

On March 19, 1985, the United States and Canada signed the Treaty on Mutual Legal Assistance in Criminal Matters. When

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* All notes follow text.

ratified, that Treaty, together with the Canadian implementing legislation when adopted,[4] will remove the legal barrier and permit (indeed, obligate) Canada to provide assistance prior to indictment. By making assistance available at the investigative stage, it diminishes considerably the need for the United States to issue or enforce Bank of Nova Scotia subpoenas for documents and records located in Canada. It also makes available international cooperative procedures and powers which our experience has shown to be the most desirable and effective.

The following technical analysis of the Treaty, similar to treaties currently in force with Switzerland, Turkey, the Netherlands, and Italy[5] and to treaties signed, but not yet ratified, with Belgium, Mexico, Thailand, the United Kingdom on behalf of the Cayman Islands, Belgium, and the Bahamas,[6] was prepared by the U.S. delegation to the treaty negotiations and reviewed by the Canadian delegation.

TECHNICAL ANALYSIS OF THE TREATY

Article I -- Definitions

Central Authority

The Attorney General of the United States and the Minister of Justice of Canada are the Central Authorities for the Treaty.[7] Their powers and duties are set forth in Articles III [other assistance], V [limitations on compliance], VI [requests], VII [execution of requests], IX [limitations of use], XI [service of documents], and XVII [proceeds of crime]. Those provisions permit them to exercise control over the making of requests, determining whether the requests meet the requirements of the Treaty, and making decisions about providing assistance when the Treaty makes such decision discretionary. The Treaty specifically contemplates that the Central Authorities will remain in close and direct contact with regard to the implementation of the Treaty and the processing of individual cases.

Competent Authority

The Treaty defines "Competent Authority" to mean "any law enforcement authority with responsibility for matters related to the investigation or prosecution of offences" and is broad enough to include authorities of states, provinces, territories, federal districts, and municipalities. Competent Authorities are permitted or required, as the case may be, to request assistance (Article VI) and to execute requests (Articles VII, X, and XVI). Law enforcement authority as used in this definition is strictly limited to persons and agencies with investigative or prosecutorial functions.[8]

"Offence"[9]

The definition of "offence" reflects technical differences between the U.S. and Canadian penal law. Having agreed that assistance under the Treaty should be mandatory only when the offense involved is serious, each delegation took responsibility for drafting its own definition. For the United States it is an offense punishable by imprisonment for one year or more. The definition includes felonies and misdemeanors but excludes petty

offenses (as those terms are used in the federal system).[10] The delegations agreed that while this definition refers to a punishment of imprisonment, Treaty assistance will be granted in situations involving corporations where no term of imprisonment is possible, so long as imprisonment could be imposed if the crime were committed by a natural person. The definition also permitted the U.S. to specify offenses in the Annex to the Treaty for which assistance would be mandatory even though they did not come within the terms of the definition; however, the U.S. found it unnecessary to specify any such offenses because the definition is broad enough to cover all serious federal and state offenses.

The Canadian definition of "offence" proved somewhat more difficult to draft. Each definition attempted by the Canadian delegation either fell short of the goal of including all offenses subject to punishment of imprisonment for a year or was over-inclusive. Ultimately the negotiators agreed on a relatively short definition sufficient to include all serious offenses in the Canadian federal criminal code ("an offence created by a Law of Parliament that may be prosecuted upon indictment"); the serious provincial offenses (relating to violations of securities, wildlife protection, environmental protection, and consumer protection laws) were included in the Annex.

Public Interest

"Public Interest," defined as any "substantial interest related to national security or other essential public policy," is significant in light of Article V which permits the Requested State to refuse assistance when the Central Authority finds that its execution would be contrary to its "public interest." It is intended to be flexible enough to permit the parties to protect basic national interests while assuring that assistance will be granted in most cases. See the analysis of Article V, below, for further discussion.

Article II -- Scope of Application

The first paragraph of this Article establishes the basic obligation of the parties to provide assistance in "all matters relating to the investigation, prosecution and suppression of offences." This language, which was intended to be as broad as possible, includes the obligation to provide assistance regardless of whether the case is still being investigated or has already been indicted. It also includes assistance for proceedings technically of a civil or administrative nature which are related to criminal prosecutions, such as forfeiture proceedings and proceedings to collect fines.

The second paragraph lists types of assistance the negotiators specifically intended to make available under the Treaty. The list is not exclusive, and the negotiators agreed that other types of assistance not contrary to the provisions of the Treaty or specifically prohibited by domestic law may be granted under the Treaty.

The third paragraph establishes the principle that assistance is available without regard to "dual criminality," i.e., whether the acts being investigated or forming the gravamen of the prosecution would have been illegal in the Requested State.[11] By avoiding a dual criminality provision in this Treaty, the United States expects to receive assistance for such important crimes as, for instance, money laundering, even though Canada has yet to enact similar legislation.[12]

Paragraph 4 is an express recognition that the Treaty is a law enforcement tool for use by the two governments and not a discovery tool for private parties. This reflects the consensus of the negotiators that neither State Party wished to obligate itself to expend resources in aid of defendants, persons working on their behalf, or other private parties.[13] The paragraph also states that the Treaty does not create a right for a defendant or other interested private party to obtain evidence, nor a basis for such a person to argue for the suppression or exclusion of any evidence; nor does it create a basis upon which such a person could attempt to frustrate the execution of a request.[14]

Article III -- Other Assistance

The first paragraph of this Article provides that the Parties, including their competent authorities, may provide assistance pursuant to other agreements, arrangements, or practices. This is to ensure that existing and future working arrangements among federal, provincial, state, and municipal authorities are not preempted or affected in any manner by this Treaty. The phrase "including their competent authorities" was intended to underscore that "agreements, arrangements, or practices" include those made at the working level.

It is recognized that some prosecutions of petty offenses are of such significance that assistance should be granted notwithstanding the definition of an offense in Article I. Thus, the second paragraph of this Article grants discretionary authority to the Central Authorities to agree to provide assistance in such cases as they may find appropriate.

Article IV -- Obligation to Request Assistance

The first paragraph provides that a Party needing documents, records, or articles located in the territory of the other and not available under any cooperative agreement or arrangement must use the Treaty to obtain them. The United States agreed to this "first resort" provision because the scope of the Treaty is broad enough to cover the vast majority of situations requiring the production of documents and records located in Canada and because the United States is convinced that the Treaty mechanism will provide the evidence in a timely manner. The Canadian delegation considered this a matter of great importance, as suggested in the introduction hereto, in order to regularize transborder evidence gathering activities and to reduce the United States' enforcement of the so-called "Bank of Nova Scotia subpoenas."[15] The Canadian delegation agreed, however, that mere service of such a subpoena would not be considered a violation of the Treaty as long as no attempt were made to enforce it until after the consultative process required by the second and third paragraphs had taken place.[16]

The last two paragraphs establish a consultative process for dealing with cases in which an investigation or prosecution is jeopardized by a refusal to grant assistance for a request under paragraph (1) or by a delay in its execution. The Central

Authority of the Requesting State initiates the process by contacting the other Central Authority. It would normally do so after a request is made, but it could be done prior thereto when the experience of the parties establishes that a request would be denied or overly delayed. The purpose of the consultations is to provide the Requested State with all the necessary facts and allow it a reasonable length of time to determine whether there is another avenue available by which the needed items could be provided promptly.

The consultation requirement of the Treaty is completed and the obligations of the Requesting State are fulfilled, thus freeing it to use its own resources to obtain the needed items, thirty days after the consultations are initiated, unless the Central Authorities otherwise agree. The time runs from the day the Central Authority of the Requesting State first contacts the other Central Authority to initiate consultations.

Article V -- Limitations on Compliance

The first paragraph of this Article establishes that there are only two bases upon which the Requested State may refuse to grant assistance: (1) the request was not made in conformity with the Treaty; or (2) execution of the request is contrary to public interest (as defined in Article I).

While the first of the two bases for refusing assistance is self-evident -- that there is no obligation to assist when the Requesting State has not properly invoked the Treaty, the clause establishes that refusal of assistance in such a case is discretionary. The clause thus serves the dual purpose of reminding the Requesting State to follow the Treaty while expressly granting the Requested State authority to waive defects.

The other basis for denying a request is that its "execution is contrary to its public interest, as determined by its Central Authority." As noted above, Article I defines "public interest" as "any substantial interest related to national security or other essential public policy." The provision is flexible enough that neither party should find itself obligated to grant assistance in cases where doing so would seriously damage its basic institutions, violate its notions of fundamental justice and fair play, or threaten its security, but restrictive enough

that a request should not be refused for inconsequential reasons. Examples of the kinds of cases the negotiators had in mind which would permit refusal of assistance include requests requiring disclosure of important military secrets or requests for assistance in a prosecution offensive to basic principles of society (e.g., if Canada were to prosecute a person for practicing his religion -- which, of course, it cannot do under its law -- the United States could refuse assistance). Specific note is made that the U.S. expects to give and receive assistance in most cases involving pure political offenses (e.g., espionage, sabotage, treason) and related offenses.[17] Similarly, assistance is not excluded solely because the offense in question is a purely military, tax, or antitrust offense.[18] The negotiators considered and rejected the possibility of requiring exact reciprocity such that if one State were to refuse assistance in a particular type or class of cases, so would the other.

The discretionary authority to grant or deny assistance was given to the executive rather than to the judiciary primarily because not all forms of assistance involve the courts.[19] It is noted that the court has inherent authority to satisfy itself that the Central Authority made its decision after fully considering all relevant issues. The court may not, however, substitute its discretion for that of the Central Authority under this language.[20]

The second paragraph allows the Requested State to postpone (but not deny) assistance in order to avoid interference with an investigation or prosecution in the Requested State.

The third paragraph provides that before the Requested State either denies or postpones a request, it must consult with the Requesting State to see if a satisfactory arrangement can be devised to permit immediate assistance. The fourth paragraph requires that any agreement reached in these consultations conducted through the Central Authorities must be respected.

Article VI -- Requests

The first paragraph of Article VI provides that requests shall be made by the Central Authority of the Requesting State directly to the Central Authority of the Requested State. While the negotiators agreed that it was not desirable to limit or control the informal and direct contact between competent

authorities on most matters, when the obligations of the Treaty are invoked, as in the case where compulsory process is needed, the Central Authorities must play a pivotal role.

The second paragraph provides the general rule that requests shall be in writing in all cases contemplating the use of compulsory process and in such other cases as the Central Authority of the Requested State may determine on a case-by-case basis. Recognizing that in urgent situations it might be impossible for the paper work to reach the other Central Authority quickly enough for the purpose of the request to be accomplished, the negotiators agreed to permit such urgent requests to be made orally. In such cases, the Central Authority of the Requesting State must provide a written confirmation as soon thereafter as reasonably possible.

The next paragraph obligates the Requesting State to provide as much information as the Requested State reasonably requires in order to execute the request and lists five elements which should normally be provided on a routine basis.

The fourth paragraph provides that the courts of the Requesting State shall have authority to order the release of the information the Requested State needs in order to execute the request. This paragraph, directed primarily at U.S. grand jury secrecy rules, authorizes U.S. courts to grant orders under Rule 6(e), Federal Rules of Criminal Procedure, permitting disclosure of grand jury information to Canada as necessary in order to obtain assistance. The negotiators also agreed that a court may condition the disclosure of the information on the Requesting State's agreement to maintain the confidentiality of the disclosed information to the extent reasonably necessary and possible.

The last paragraph establishes a general rule that the Requested State will use its "best efforts" to keep a request and its contents confidential except when permitted to disclose that information by the Requesting State.[21]

Article VII -- Execution of Requests

The first paragraph of the Article obligates the Central Authority of the Requested State promptly to execute the request itself or send it to the appropriate competent authority for

expeditious execution. U.S. federal agents, attorneys, and courts will normally execute Canadian requests. State and local authorities, nevertheless, are also bound to assist when necessary (for instance, when records of convictions from local courts are requested).

The paragraph also provides that the courts of the Requested State shall have jurisdiction to issue necessary process (subpoenas, search warrants, or other orders) to give effect to the request. This provision serves several different purposes. First, it obligates Canada to enact necessary implementing legislation.[22] Second, it authorizes state and local courts in the U.S., to the extent that they are called upon to execute a request, to issue necessary process. Third, it provides slightly broader authority than 28 U.S.C. 1782 for U.S. federal courts to use their power to issue subpoenas and other process when Canada needs evidence for use before an administrative agency, as might be the case in connection with a Canadian forfeiture proceeding under Article XVII of the Treaty.[23]

Article VII(2) provides that the Requested State is to execute the request pursuant to its own laws, practices, and procedures, except that "directions stated in the request" will be honored unless prohibited by domestic law. For instance, if the Requesting State asks that a deposition be video taped, the Requested State should do so unless its law prohibits video taping such proceedings. The "directions stated in the request" will also include such important but somewhat more routine matters as requests for notice to the Requesting State of the time when the request will be executed and requests that certain necessary persons (i.e., the accused, defense counsel, or case agent) be allowed to be present when the evidence is taken.

Article VIII -- Costs

This Article reflects a careful balancing of three factors. First, the Requested State should normally assume the cost of gathering evidence within its own boundaries. Second, the Requesting State should normally bear the costs of bringing witnesses to the Requesting State. Third, where execution of a request will be substantially more costly than reasonably expected, the parties must consult to determine whether the

request merits the expenses and, if so, how to minimize and allocate them.

Further, the last paragraph reflects an undertaking of the Parties to agree on practical measures for the reporting and payment of costs. The Central Authorities intend to exchange letters prior to the Treaty's entry into force establishing clear channels and procedures for "billing" and "collecting" payment of costs.

Article IX -- Limitations of Use

The first paragraph of Article IX provides that the Requested State may impose limitations on the use by the Requesting State of information or evidence obtained under the Treaty. Before doing so, however, the Requested State must engage the other State in consultations. The purpose of the consultations is to discuss the necessity for and scope of the limitations and the ability of the Requesting State to comply with the limitations.

In contrast to Article V(4), there is no absolute obligation for the Requesting State to comply with conditions imposed under this paragraph. Under Article V the Requested State has a right to postpone assistance or refuse it altogether such that granting assistance subject to conditions is done as a matter of grace. In that case, the Requesting State must comply or forego the assistance. This paragraph deals with the situation in which the Requesting State has a right to demand compliance, but the Requested State wishes to keep the information confidential or allow it to be used only in a certain manner. The negotiators agreed that in this situation it would be illogical for the Requesting State to be bound absolutely to comply with the conditions; they agreed, nevertheless, that the Requesting State has a moral obligation to comply to the extent reasonably possible.[24]

The second paragraph imposes an obligation on the Requesting State to disclose or use the information or evidence it obtains only for the purposes stated in its request unless the Requested State grants permission for such other use or disclosure.

The last paragraph provides that once the information or evidence becomes public in the Requesting State, that State is

free to use it for any purpose. In discussing this provision, the negotiators considered the possibility of including language making clear that the information or evidence should be made public only as permitted by the Treaty. The negotiators ultimately agreed that such language was unnecessary since both parties are expected to deal in good faith.

A chief concern in the negotiation of this Article was whether the Requesting State would be able to protect the identity of informants when the Requested State believed it necessary for security reasons. After exchanging assurances that methods were available under each Party's laws permitting the authorities to protect the identity of informants, an understanding was reached that special care would be taken to ensure the confidentiality of that information to the extent required by the Requested State.

Article X -- Location or Identity of Persons

Under this Article, commonly found in mutual legal assistance treaties, the parties agree to use best efforts to locate or determine the identity of persons specified in the request.

Article XI -- Service of Documents

The first two paragraphs are commonly found in mutual legal assistance treaties. The first provides that the Requested State agrees to serve documents at the request of the other State. The second provides that when the Requesting State wishes to have a document served requiring a response or appearance in the Requesting State, it must transmit the document to the Requested State early enough so that the person served will have a reasonable opportunity to comply.

The third paragraph of this Article relates to an issue which was the subject of a great deal of discussion during the negotiations, namely, whether a person voluntarily travelling from the Requested State to the Requesting State to appear as a witness should be granted "safe conduct" (i.e., assurance that he would not be subject to arrest on account of any acts which preceded his departure from the Requested State). On one hand,

there was the concern that the Requested State would not wish to encourage witnesses to travel to the Requesting State if safe conduct were not guaranteed; on the other hand, it was recognized that the Requesting State would want to avoid being surprised by finding that persons wanted for serious offenses were entering its territory routinely under the protection of the Treaty.

Paragraph 3 of Article XI represents a compromise among these competing interests. It provides that the Requesting State must make a reasonable effort to include in its request for service of such process information concerning outstanding warrants or other process in criminal matters pertaining to the person served. Assuming no such process is outstanding, the person would be so advised; however, the officer serving the document would not be under an obligation to encourage the person to go to the other State. Indeed, the serving officer might go so far as to advise the person that the possibility exists of process being outstanding, the existence of which the Central Authority providing the information was unaware.[25]

The fourth paragraph of the Article provides that the Requested State shall return proof of service in any manner agreed upon in Article XVIII of the Treaty. The reference to Article XVIII is intended to provide the parties flexibility to change the form and contents of the return in keeping with changes in domestic law.

Article XII -- Taking of Evidence in the Requested State

The first paragraph of this Article obligates the Requested State to use court process, if necessary, to compel persons to appear and testify and produce documents at the request of the Requesting State. In drafting this provision, the negotiators originally considered using the word "shall" in order to underscore the obligatory nature of the Article. Because the mandatory "shall" failed to take into account the witnesses who appear voluntarily, thus making court process unnecessary, this formulation using "may" was agreed to, with the understanding that the Requested State is obligated to use mandatory process when necessary to execute the request.

Current U.S. law already provides that a court may issue a subpoena for a witness to appear, testify, and produce documents in execution of a foreign request for assistance in the

investigation of a case. 28 U.S.C. 1782. Canadian law does not. Present Canadian procedure requires the use of a search warrant in order for physical or documentary evidence to be obtained during the course of an investigation.[26] The Canadian delegation gave express assurances to the U.S. delegation that its implementing legislation would address this point, allowing for courts to issue process in the nature of a subpoena duces tecum when necessary to execute a request.[27]

The reference in the first paragraph to execution of the request "in accordance with the requirements of the law of the Requested State" takes into account testimonial privileges and immunities as well as procedure. The parties agreed that questions concerning the applicability of privileges provided by the law of the Requesting State would be preserved for consideration by the courts of that State.[28]

The second paragraph provides that a person appearing as a witness or producing documents pursuant to this Article is entitled to the same fees and allowances as the Requested State normally would provide if the appearance were for a purely domestic purpose.

Article XIII -- Government Documents and Records

This Article serves the purpose of assuring that records and documents in the possession of one Party are made available to the other for criminal justice purposes. Examples of the types of government documents and records covered by this provision are court records (including records of convictions), police records, immigration records, articles of incorporation, and birth and death records. Given the various types of records to be exchanged under this provision, the negotiators agreed that "government" means all levels of government, including federal, state, provincial, territorial, and municipal.

The first paragraph obligates the Requested State to produce copies of publicly available documents and records upon demand. The second paragraph obligates the Requested State to provide copies of documents, records, or information not publicly available "to the same extent and under the same conditions as [they] would be available" to domestic law enforcement and judicial authorities.

In discussing this Article, the U.S. delegation explained the significance of 26 U.S.C. 6103(k)(4), indicating that if the negotiators agreed that this was intended to be a vehicle by which tax information could be provided, then the U.S. could give Canada assistance when it needed information in the possession of the IRS which otherwise could not be furnished. The Canadian delegation responded that the assistance it intended to grant did include tax information,[29] noting, however, that implementing legislation would be required on the Canadian side. The U.S. delegation was, therefore, satisfied that these understandings and agreements make this Treaty a "convention" within the meaning of 26 U.S.C. 6103(k)(4).

Article XIV -- Certification and Authentication

This Article, together with the provisions of Article VII(2) requiring that the Requested State execute requests in accordance with the directions contained in the request, Article XI relating to the return of service, and Article XVIII permitting the parties to agree on specific measures to facilitate the implementation of the Treaty, are of critical importance. Together they ensure that the Requested State will certify or authenticate documents and records provided under the Treaty in a manner designed to establish a proper foundation for admission into evidence.

The first paragraph of this Article permits the needed certification or authentication to be specified in the request or to be agreed upon in advance pursuant to Article XVIII. By way of example, the United States intends to reach agreement with Canada under Article XVIII that it will certify "records of a regularly conducted activity," as defined by 18 U.S.C. 3505, pursuant to a "3505" form supplied by the United States.[30] The "3505" form and others the United States intends to begin using immediately are contained in the appendix to this analysis. Other situations where the certification/authentication procedure is not so well defined will be handled on a case-by-case basis.

During the negotiations, careful thought was given to the feasibility of appending standard certification forms to the Treaty, as has been done in other mutual legal assistance treaties. For instance, our Mutual Legal Assistance Treaty with Thailand[31] provides forms to certify business records (Article

8(5)), records of a government office or agency (Article 9(3)), and articles seized pursuant to a search and seizure (Article 11(2)). Ultimately, the negotiators agreed not to include such forms in favor of making the Treaty as flexible as possible.

The second paragraph of Article XIV provides that a document or record certified or authenticated pursuant to the first paragraph and which is otherwise admissible shall require no further certification or authentication. The purpose of this paragraph is two-fold. First, it is intended to indicate that the courts retain full authority to rule on the admissibility of the proffered evidence with regard to materiality, relevance, etc.; second, it is intended as a direction to the courts that, if the documents or records have been certified and authenticated pursuant to paragraph 1 of this Article and are otherwise admissible, the courts should not exclude the evidence because of a technical defect in the certification or authentication.

In this connection, the types of certifications and authentications the United States intends to request of Canada in order to provide a foundation for evidence obtained under the Treaty include those:

1. Established or permitted by the Federal Rules of Evidence or by a statute such as 18 U.S.C. 3505;[32]

2. Contained in or appended to other mutual legal assistance treaties ratified by the United States in a similar manner and for the same purpose as provided in those treaties;[33] or

3. Available under other treaties and multilateral conventions currently in force or which may enter into force relating to certification, authentication, or legalization of documents.[34]

Implementing legislation is unnecessary inasmuch as it is intended that established procedure will be followed for offering and determining admissibility of evidence so certified or authenticated. See, e.g., 18. U.S.C. 3505 and Rules 804(b)(5) and 901 of the Federal Rules of Evidence.

Article XV -- Transfer of Persons in Custody

This Article deals with the relatively common situation in which a person incarcerated in one country is needed as a witness in the other. On some occasions it has been possible for ad hoc arrangements to be made to permit the person to be escorted to the other country, testify at the trial or other proceeding, and then return to the Requested State.[35] This Article, which is commonly found in our mutual legal assistance treaties,[36] establishes the procedures for this to occur on a routine basis.

This Article applies to a "person in custody." The phrase is intended to mean a person in the custody of an authority at any level of government (federal, state, local, etc.). Transfer requires the consent of the person in custody as well as the consent of the Requested State. The Requesting State is expected to keep the person in custody and return him to the Requested State as soon as possible.

The requirement in paragraph two that the person transferred be returned "immediately after the execution of the request" means that the person cannot be arrested, detained, or subjected to criminal process[37] for acts which predated his arrival in the Requesting State. Extradition procedures are not required in order to assure the return of the person transferred pursuant to this paragraph.

The negotiators discussed the situation where the Requested State's basis for detention expires while the person is in the Requesting State. It was agreed that, in such cases, the Central Authorities had sufficient authority under Article XVIII to agree to release him while he was still in the Requesting State and to relieve the Requesting State of the necessity for returning him to the Requested State.[38]

Article XVI -- Search and Seizure

This Article obligates each Party to conduct searches and seizures at the request of and for the benefit of the other. The requirement in paragraph 1 that the search and seizure be executed "in accordance with the requirements of

the law of the Requested State" is understood to include constitutional requirements.[39]

The second and third paragraphs of the Article are designed to permit the Requesting State to seek the admission into evidence of items seized based on certifications provided by the competent authority in the Requested State, thus avoiding the need to take depositions or produce live witnesses to establish the chain of custody. The negotiators considered the possibility of appending a form "chain of custody" certification to this Treaty but decided against it for the reasons explained in the discussion of Article XIV. The intent is to give each party maximum flexibility to devise (and revise as experience may dictate) instructions to be followed by the Requested State in completing the certifications. The United States intends to urge the admission of these certificates into evidence under Rule 803(24) of the Federal Rules of Evidence.

The last paragraph grants the Requested State authority to fashion appropriate conditions prior to transferring seized items to the Requesting State in order to ensure that the interests of a third party in that property are protected.

Article XVII -- Proceeds of Crime

This Article deals with forfeiture, restitution, and collection of fines. The subject of protracted discussions during the negotiation of the Treaty, it reflects the intent of both parties to provide as much assistance as their respective laws allow in this rapidly developing area of the law.

The Article obligates each Central Authority to notify the other of proceeds of crime[40] believed to be located in the territory of the other Party and for each to assist the other to the extent permitted by their respective law with regard to forfeiture, restitution, and collection of fines.

The obligation to assist includes <u>all</u> types of assistance. It was specifically agreed, however, that neither party is obligated to: (1) transfer forfeited property to the other State; (2) transfer property to the

other Party where forfeiture proceedings would be instituted; or (3) institute and prosecute claims on behalf of the other for forfeiture or the collection of fines or restitution on behalf of the victims.

Developments in the law since the Treaty was signed show the wisdom of leaving the Article as open-ended as possible in order to allow both Parties to "grow" into it. For instance, since this Treaty was negotiated, the United States has enacted legislation, the Anti-Drug Abuse Act of 1986[41] (hereinafter, "the Act"), expanding the authority of the United States to seize and forfeit property:

> which represents the proceeds of an offence against a foreign nation involving the manufacture, importation, sale, or distribution of a Controlled Substance (as such term is defined for the purposes of the Controlled Substances Act) within whose jurisdiction such offence or activity would be punishable by death or imprisonment for a term exceeding one year and which would be punishable by imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States. [18 U.S.C. 981(a)(1)(B).]

The Act also permits the U.S. to transfer an equitable share of certain forfeited property to other countries. Under regulations promulgated by the Attorney General, this equitable share will generally reflect the direct or indirect contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The Act requires that these provisions operate only "to the extent provided for by Treaty" and pursuant to "treaties providing for the transfer of forfeited properties to the foreign country." 18 U.S.C. 981(a)(1)(b) (1986). As noted above, Article XVII does not obligate either party to transfer forfeited properties, but does permit such transfer (or, at least, the proceeds of the sale of such assets, or an equitable portion thereof). Thus, the Executive Branch takes the position that this Article is sufficient to permit the equitable sharing of forfeited assets pursuant to 18 U.S.C. 981.

Another type of assistance for which domestic law continues to evolve relates to the collection of fines imposed in the foreign jurisdiction as a penalty in criminal proceedings. The Canadian delegation indicated that it intended to include a

provision in the Canadian implementing legislation to permit the United States to prosecute an action against assets in Canada to collect such a fine, and the United States indicated an intention to reciprocate, if possible.

The Canadian legislation now pending before Parliament provides in Section 9:

> (1) Where the Minister [of Justice] approves a request of a foreign state to enforce the payment of a fine imposed by a court of criminal jurisdiction of the foreign state, a court in Canada has jurisdiction to enforce the payment of the fine and the fine is recoverable in civil proceedings instituted by the foreign state, as if the fine had been imposed by a court in Canada.
>
> (2) No proceedings under subsection (1) shall be instituted more than five years after the fine was imposed.

The scheme established by this legislation is straightforward: when assets of a person sentenced to pay a fine by a court of the United States are located in Canada, the United States will make an application to Canada under the Treaty for authorization to enforce the criminal fine against the Canadian assets. If the Ministry approves, it will grant authorization permitting the United States to file an action to collect the fine pursuant to Canadian law and procedure.

It is intended that the United States will reciprocate, thus allowing Canada to collect its fines through enforcement action against assets located in the United States.

The general rule of international law is that one country will not enforce the penal judgments of another.[42] The general rule may be modified by treaty, however. The court in Rosado v. Civiletti, 621 F.2d 1179 (2nd Cir. 1980), had occasion to discuss this rule in the context of the Prisoner Transfer Treaty between the United States and Mexico.[43] Judge Kaufman, speaking for the court, noted:

> In dictum too old to question, Chief Justice Marshall declared that '(t)he courts of no country execute the penal laws of another.' The Antelope, 23 U.S. (10 Wheat.) 66, 123, 6 L.Ed. 408 (1825). . .

> Though no nation may unilaterally bind another sovereign by the sheer force of its statutory enactments, nothing in the doctrine enunciated by Marshall precludes a sovereign power from extending recognition to another's penal laws where it chooses to do so. Nor does Marshall's dictum suggest any principle limiting the power of sovereign nations to enter into mutual compacts or treaties obligating the signatories to honor and enforce the penal decrees of one another. In the United States, the constitutionality of such measures was decided long ago when the Supreme Court upheld an extradition agreement with foreign nations as a valid exercise of the treaty-making power. See Terlinden v. Ames, 184 U.S. 270, 289, 22 S.Ct. 484, 491, 46 L.Ed. 534 (1902). See also Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569-70, 10 L.Ed. 579 (1840). Even where the treaty fails to secure to those who are extradited to another country the same constitutional safeguards they would enjoy in an American criminal trial, it does not run afoul of the Constitution. . . . Moreover, criminal convictions imposed by foreign tribunals have served as predicates for enhanced sentencing under state multi-offender statutes. See, e. g., United States ex rel. Dennis v. Murphy, 265 F.2d 57 (2d Cir. 1959); United States ex rel. Foreman v. Fay, 184 F.Supp. 535 (S.D.N.Y. 1960). [Emphasis added.]

It is intended that the method for implementing this provision in the Treaty will be for the Central Authority of the United States to review the Canadian request and, if it finds it to be an appropriate case for enforcement, to issue an appropriately worded certificate under the Great Seal of the Department of Justice which the Canadian representative may present to the court upon the filing of a civil action for recognition and enforcement of Canada's claim.

Article XVIII -- Improvement of Assistance

This Article, discussed above in connection with Articles XI, XIV, and XV, is otherwise self-explanatory.

TECHNICAL ANALYSIS
MUTUAL LEGAL ASSISTANCE TREATY BETWEEN UNITED STATES AND CANADA

Article XIX -- Ratification and Entry into Force
and
Article XX -- Termination

These last two articles contain standard language concerning ratification, the exchange of instruments of ratification, entry into force, and termination of the Treaty.

APPENDIX

CERTIFICATE OF AUTHENTICITY OF BUSINESS RECORDS [44]

I the undersigned: _____,
understanding that I am subject to criminal penalty under the law of Canada for an intentionally false declaration, declare that I am employed by/associated with: _____
_____ in the position of: _____
and by reason of my position am authorized and qualified to make this declaration.

I further declare that the documents attached hereto are originals or true copies of records which:

1. were made, at or near the time of the occurrence of the matters set forth therein, by (or from information transmitted by) a person with knowledge of those matters;
2. were kept in the course of a regularly conducted business activity;
3. were made by the said business activity as a regular practice; and,
4. if not original records, are duplicates of original records.

The originals or duplicates of these records are maintained in the country of: _____.

Date of execution: _____

Place of execution: _____

_____
(signature)

(33)

ATTESTATION OF AUTHENTICITY OF FOREIGN PUBLIC DOCUMENTS [45]

I, [Name], attest on penalty of criminal punishment for false statement or attestation that my position with the Government of Canada is [Official Title] and that in that position I am authorized by the law of Canada to attest that the documents attached and described below are true and accurate copies of original official records which are recorded or filed in [Name of Office or Agency], which is a government office or agency of Canada.

Description of Documents:

[Signature]

[Title]

[Date]

(34)

ATTESTATION WITH RESPECT TO SEIZED ARTICLES[46]

I, the undersigned, [Name and Title or Position], attest on penalty of criminal punishment for false statements or attestation that I:

-- seized the articles listed below from [person] on [date] at [place] *

-- received custody of the articles listed below from [person] on [date] at [place] *

Description of articles:

I declare that I relinquished custody of those articles on [date] at [place] to: [Name(s) Title or Position].

I declare that, while they were in my custody, these articles were:

-- in no way altered. *

-- altered in the following manner: *

DONE this _____ day of _____, ____, at [place].

(signature)

* cross out the inapplicable statements

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1. Section 43, Canada Evidence Act, requires that the matter for which a foreign state requests assistance must be pending before a court in the foreign state. It has been held to preclude assistance to the United States when the case was still before a grand jury. Re United States of America and Executive Securities Corporation (1977) 77 D.L.R. (3d) 157 (O.N.C.) (relying on Re Raychem Corp. v. Canusa Coating Systems, Inc. (1971) 14 D.L.R. (3d) 684 (Ont.C.A.) and Re Radio Corp. of America v. Rauland Corp. (1956 5 D.L.R. (2d) 424 (O.N.C.), both civil cases); but, see, Zinger, Wuest and Reiser and The Queen, (1981) 2 SCR 392 (allowing execution of letters rogatory from Switzerland at a pre-trial stage when the investigation in Switzerland was undertaken pursuant to a treaty request from Canada), and Re International Association of Machinists and Aerospace Workers et al. and Qantas Airways Ltd. et al, 42 O.R.(2d) 387 (1983) indicating that letters rogatory may be executed at a pre-trial stage if the court is convinced that it is for the purpose of obtaining evidence for use at trial and not for the purpose of discovery or further investigation of the matter.

2. Assistance is available for a foreign country under 28 U.S.C. 1782 without regard to whether the action has already been filed.

3. In Re Grand Jury Proceedings (Bank of Nova Scotia), 740 F.2d 817 (11th Cir. 1984); In Re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1983).

4. Bill C-58, Second Session, Thirty-third Parliament, 35-36 Elizabeth II, 1986-87, First Reading, May 13, 1987 (hereinafter, "Canadian implementing legislation").

5. Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1971, 27 UST 2019, TIAS 8302 (entered into force January 23, 1977); Treaty between the United States and the Republic of Turkey on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, 32 UST 311, TIAS 9891 (entered into force January 1, 1981); Treaty between the United States and the Kingdom of the Netherlands, together with a Related Exchange of Notes, June 12, 1981, TIAS 10734 (entered into force September 15, 1983); Treaty between the United States and the Italian Republic on Mutual Assistance in Criminal matters, together with a Related Memorandum of Understanding, November 9, 1982, TIAS ____ (entered into force November 13, 1985).

6. Treaty between the United States and the Kingdom of Belgium, January 28, 1988; Treaty between the United States and the United Mexican States on Cooperation for Mutual Legal Assistance, December 9, 1987; Treaty between the United States and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, March 19, 1986; Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands on Mutual Assistance in Criminal Matters, July 3, 1986; Treaty between the United States and the Kingdom of Belgium on Mutual Legal Assistance in Criminal Matters, January 28, 1988; Treaty between the United States and the Bahamas on Mutual Assistance in Criminal Matters, June 12, 1987, and August 18, 1987.

7. By published regulations, the Attorney General has delegated his authority under such treaties to the Assistant Attorney General for the Criminal Division, who, in turn, has redelegated the authority to the

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Deputy Assistant Attorneys General, Criminal Division, and the Director of the Office of International Affairs. 28 C.F.R. 0.64-1 and Directive No. 81 (44 FR 18661, March 29, 1979, as amended at 45 FR 6541, Jan. 29, 1980; 48 FR 54595, December 6, 1983).

8. It was agreed that there is no objection to the Requesting State's sharing evidence provided by the Requested State with a legislative commission (such as a Royal Commission of Enquiry) or a Congressional Committee in the Requesting State as permitted by and pursuant to the terms of Article IX of the treaty ("Limitations on Use").

9. At the request of the Canadian delegation, the Canadian spelling of "offence" was used.

10. See, 18 U.S.C. 1.

11. Dual criminality is a principle often found in extradition treaties generally prohibiting extradition if the conduct forming the gravamen of the offense in the Requesting State would not have been illegal if performed within the jurisdiction of the Requested State. For a discussion of this principle, see Collins v. Loisel, 259 US 309, 312 (1922). See also Cucuzzella v. Keilikos, 638 F.2d 105, 108 (9th Cir. 1981).

12. The Canadian Embassy has advised the United States that Canada is working on such legislation at this time.

13. This provision may be unnecessary inasmuch as the Central Authority of the Requested State has the ability under Article V(1)(b) to refuse such requests as contrary to the public interest of the State. Nevertheless, including this provision in the treaty was desirable in that it (1) constitutes a directive to the Requesting State not to make such requests and (2) reduces the number of instances in which the Requested State will find it necessary to invoke its authority to refuse a request as being contrary to the public interest, preserving that provision's use for cases more clearly involving matters of national security, or essential public policy.

14. This clause reflects the desire of the negotiators to avoid the creation of new rights or the alteration of existing rights available to the defense or private parties. Simply stated, this means that a private party wishing to oppose execution of a request must base his opposition on something other than the provisions of the Treaty; if a private party wishes to suppress or exclude evidence obtained under the Treaty, he must base his arguments on something other than the provisions of the treaty.

15. In Re Grand Jury Proceedings (Bank of Nova Scotia), 740 F.2d 817 (11th Cir. 1984); In Re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1983).

16. Such a subpoena might be served for the purpose of putting the one possessing the documents on notice that those documents are needed as evidence and that their destruction could be prosecuted as a crime or as contempt of court. See Rule 17(g), Federal Rules of Criminal Procedure.

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17. For a discussion of offenses "related" to political offenses in the extradition context, see, Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).

18. Indeed, it is specifically intended that assistance will be granted for fiscal offenses.

19. For instance, if Canada were to request the United States to make available certain arrival and departure records maintained by the Immigration and Naturalization Service concerning aliens, there would be neither a basis nor a necessity for requesting judicial intervention.

20. Of course, nothing in the Treaty could require a court to execute a request when doing so would be contrary to the Constitution of the United States. See Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957)

This provision is also favorable for the United States inasmuch as it gives greater assurance that a Canadian court will not refuse assistance.

21. The provision requires "best efforts" since the Requested State may have an affirmative obligation to disclose the information, regardless of the confidentiality requested by the other State. For example, if the United States were to find that a request from Canada contained information exculpatory to a defendant, the United States would be obliged to disclose it to the defendant. Brady v. Maryland, 373 U.S. 83 (1963); U.S. v. Starusko, 729 F.2d 256 (3d Cir. 1984).

22. The Canadian implementing legislation currently before Parliament provides for the issuance of a search warrant in sections 10 and 12 ("Search and Seizure") and for an order in the nature of a subpoena duces tecum in sections 17 and 18 ("Evidence for use Abroad").

23. The United States Court of Appeals for the Second Circuit has ruled that in order for a court to execute a foreign request for evidence the requirement of 28 U.S.C. 1782 that the evidence be for use before a tribunal in that foreign state is to be applied strictly such that assistance could not be granted on behalf of an administrative agency. Fonseca v. Blumenthal, 620 F.2d 322 (2nd Cir. 1980); In Re Letters Rogatory issued by the Director of Inspection of the Government of India, 385 F.2d 1016 (2nd Cir. 1967).

24. It is noted that a problem similar to that discussed in note 21, supra, could require that the U.S. to refuse to comply with the limitation on use requested by the Canadian Central Authority. See Brady v. Maryland and U.S. v. Starusko, supra, note 21.

25. During the discussions, it was noted that there are a number of methods by which persons located in the territory of one State may be invited to travel to the other to appear as witnesses or for other purposes. Currently existing working arrangements provide for authorities in each country routinely to assist the other by inviting, on behalf of the other, persons to travel to the other state to appear as a witness. As provided by Article III of the Treaty, those arrangements are to remain in place. Further, there is no prohibition against the authorities of one state contacting potential witnesses by telephone to invite them to appear in court. It was also noted during the discussions that the United States would be able to serve subpoenas under 28 U.S.C.

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1783 on U.S. nationals or residents located in Canada using methods other than those provided by the Treaty.

26. It is noted that Section 43 of the Canada Evidence Act does permit a court to order "production of any writings or other documents. . ." However, as discussed in note 1 and the accompanying text, Section 43 procedures have generally been unavailable prior to indictment of the case.

27. The Canadian implementing legislation provides in Section 18(2) that, in execution of a request under a treaty such as this, a court may order a person to appear and testify and

> (a) . . . order the person so named, where appropriate, to make a copy of a record or to make a record from data and to bring the copy or record with him, and order the person so named to bring with him any record or thing in his possession or control, in order to produce them to the person before whom the examination is made . . . .

28. The U.S. delegation informed the Canadian delegation that it intended to follow its standard practice of noting assertions of foreign privileges and immunities for the record and then compelling the witness to answer. See, e.g., R. & J. Dick Co. v. Hess, 295 F.Supp. 758 (N.D. Ga. 1966), a case involving a federal court in Georgia in a diversity action being requested by a Pennsylvania court to take the deposition of persons located in Georgia who had no privilege under Georgia law to refuse to testify but might have a privilege under Pennsylvania law (where the suit was pending).

The court may protect the witness' rights under foreign law by an appropriate order, if necessary. For instance, in the R. & J. Dick Co. case, supra, the court ordered:

> . . . that the deposition proceed, but solely upon the condition that all copies thereof, when transcribed, be sealed and delivered to the clerk of this court, and that the contents thereof be not divulged or disclosed by either of the parties or their counsel to any other person or persons pending a ruling by the court as to what portions of such deposition, if any, shall be admitted in evidence.

29. Canada will be able to provide tax information to authorities in the U.S. where the law permits Canadian police forces to obtain such information. Where the law prohibits Canadian police forces from obtaining such tax information, this information would be unavailable to the U.S.

30. See, United States v. Miller, 830 F.2d 1073 (9th Cir. 1987).

31. Treaty between the United States and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, signed at Bangkok on March 19, 1986.

32. The form in the appendix, "CERTIFICATE OF AUTHENTICITY OF BUSINESS RECORDS", is based on the form used in United States v. Miller, 830 F.2d 1073 (9th Cir. 1987). The court in Miller found the records so certified

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to have been properly admitted into evidence, pursuant to 18 U.S.C. 3505.

33. See the forms contained in the Treaty between the United States and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, March 19, 1986; the Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands on Mutual Assistance in Criminal Matters, July 3, 1986; and the Treaty between the United States and the Bahamas on Mutual Assistance in Criminal Matters, June 12, 1987, and August 18, 1987.

34. An example is authentication under the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, done at the Hague October 5, 1961, entered into force for the United States October 15, 1981, T.I.A.S. 10072, 527 UNTS 189. Documents so authenticated would be offered for admission under Rule 902(3) of the Federal Rules of Evidence.

35. For example, on January 23, 1986, federal prisoner Edward Hayes Ward was temporarily released from the Federal Correctional Institution at Talladega, Florida, to travel to Nassau, the Bahamas, and testify for the Government at a preliminary inquiry in the case of Commissioner of Police v. George Smith and Everette Bannister, Case No. 4948-85. Ward was accompanied by DEA agents, who saw to his security and insured his prompt return to the United States when his testimony was no longer needed.

36. See note 5, supra. Article 26 of our treaty with Switzerland, Article 32 of our treaty with Turkey, Article 7 of our Dutch treaty, and Article 16 of our Italian treaty.

37. The reference to "criminal process" is intended to reflect that no agreement was reached by the negotiators with regard to civil or administrative process. However, such process could not be used to delay the person's return to the Requested State.

38. Nothing contained in the Treaty, of course, grants the person in such a case a right not otherwise existing to remain in the territory of the Requesting State.

39. Whether "dual criminality" (see note 13, above) is a Constitutional requirement for search and seizure has yet to be decided by our courts.

40. The negotiators agreed that the term "proceeds of crime" is intended to include all property obtained directly or indirectly as a result of the commission of an offence (e.g., art work purchased with drug profits).

41. Pub.L. 99-570, Title I, Section 1366(a), October 27, 1986, 100 Stat. 3207.

42. International Cooperation in Civil and Commercial Procedure, Edited by Ludwik Kos-Rabcewicz-Kubkowski, 397 (1975).

43. Treaty between the United States and Mexico on the Execution of Penal Sentences, November 25, 1976, 28 UST 7399, TIAS 8718 (entered into force November 30, 1977).

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44. This form is intended for use in connection with 18 U.S.C. 3505 records and is based on the certificate used in United States v. Miller, 830 F.2d 1073 (9th Cir. 1987).

45. This form is to be used primarily in connection with Article XIII of this Treaty ("Government Documents and Records").

46. This form is to be used to establish chain of custody of articles seized pursuant to Article XVI.

(41)

Senate of the United States

IN EXECUTIVE SESSION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, with annex, signed at Quebec City on March 18, 1985.

ADDITIONAL VIEWS OF SENATOR JESSE HELMS

During consideration of the Genocide Convention in 1985, the Foreign Relations Committee adopted a reservation aimed at protecting the constitutional rights of Americans. Unless a similar reservation is attached to this Treaty, the constitutional rights of Americans will unnecessarily be left at risk.

This treaty seeks to enhance national and international law inforcement interests and aims to overcome the alleged burdens placed upon governments attempting to control interstate criminality.

The treaty seeks to allow U.S. prosecutors to obtain some assistance from foreign countries in obtaining evidence, and other matters, of importance to prosecutions.

But this treaty also seeks to help foreign governments obtain evidence for their prosecutions. Other countries have different systems of law. And the Constitution of no other country protects the rights and freedoms of its citizens as does the United States Constitution.

Other countries could demand evidence from the U.S. that would not be admissible in our own courts under our Constitution. Or they could seek U.S. evidence relating to persons in their own countries just to see how much we know.

So the question is this: Will this Treaty unintentionally result in an infringement upon the Constitutional rights and freedoms of American citizens.

As these treaties are currently drafted, we can be certain there will be a full scale assault against American liberties. The group of lawyers most concerned with protecting the rights of U.S. citizens in courts abroad—the International Legal Defense Counsel—strongly opposed enactment of these treaties "as is" in hearings of the Senate Foreign Relations Committee.

Mr. Chairman, there is a dispute among scholars as to whether or not the Constitution of the United States supersedes treaties in all instances. Nor have the courts settled this issue. The State Department has cited *Reid* v. *Covert,* 354 U.S. 1 (1956), as standing for the proposition that the Constitution always prevails where a case concerns matters both within the territorial boundaries of the United States or in foreign lands.

Yet, such an interpretation misreads the *Reid* v. *Covert* holding. This case holds only that executive agreements consummated by the President without advice and consent of the Senate must conform to the Constitution in all circumstances. Treaties, however, are not executive agreements; indeed treaties are another matter.

As the distinguished justice and legal scholar, John Marshall Harlan III, wrote in his concurring opinion in *Reid* v. *Covert,* "I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to Amer-

ican citizens in every part of the world . . . The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place." (Harlan, J., concurring, at 74).

Furthermore, in *Missouri* v. *Holland,* 252 U.S. 416 (1920), Justice Holmes suggested that there is no substantive limit to the treaty-making power. In *Ware* v. *Hylton,* 3 Dall. 199, 284 (1796) Justice Cushing wrote that the "Treaty . . . is of equal force with the Constitution.

I wish it were the case that the Supreme Court had conclusively determined that the Constitution is supreme in all cases. But since this determination has not been made, a reservation is necessary to assure that Constitutional rights of Americans are not abridged by the execution of these treaties.

For those who hold the view that the Supreme Court has held that the Constitution supercedes a treaty, then these reservations merely confirm their beliefs. However, if that view is wrong; this reservation will save the day.

In addition, under Article 27 of the Vienna Convention on the Law of Treaties—which the State Department perceives as customary international law—no state may "invoke the provisions of its internal law as justification for failure to perform a treaty." So even if we all are agreed that the Constitution—our fundamental internal law—takes precedence, international law seems to be pointing in the other direction.

Indeed, this possibility that the United States might be found in default of international obligations was a major factor in the Committee's approval of the Constitutional Reservation to the Genocide Convention.

As the Committee Report on the Genocide Convention stated:

> (t)he problem is that international law does not recognize the Constitution as supreme.
> Article 27 of the Vienna Convention on the Law of Treaties, which represents customary international law on this point, provides that no state may 'invoke the provisions of its internal law as justification for its failure to perform a treaty'.
> Thus, without the Committee's recommended reservation, were a conflict to arise between the requirements of the Constitution and those of the Convention, the United States might be found to be in default of its international obligation.

Just as was the case with the Genocide Convention, a reservation is necessary for this Mutual Legal Assistance Treaty to assure that if a conflict arises between the requirements of the Constitution and those of the Treaty, the United States will not be found to be in default of its international obligation. That is why a reservation is necessary to make the supremacy of the Constitution a part of the Treaty itself and therefore enforceable.

Specifically, the Senate should add a reservation identical to the Lugar-Helms reservation added to the Genocide Convention. It simply provides that:

> Nothing in this treaty requires or authorizes legislation or other action by the United States prohibited by the U.S. Constitution as interpreted by the United States.

Such a proposal would constitute what some would call a category II amendment. It would be included in the instruments of ratification exchanged with the other countries, yet would require no renegotiation. The other party would simply accept it by ratification, and the constitutional rights of Americans would be secure.

JESSE HELMS.

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100TH CONGRESS
2d Session

SENATE

EXEC. REPT.
100-29

TREATY WITH BELGIUM ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

SEPTEMBER 30 (legislative day, SEPTEMBER 26), 1988.—Ordered to be printed

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Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany Treaty Doc. 100-16]

The Committee on Foreign Relations, to which was referred the treaty between the United States of America and the Kingdom of Belgium on Mutual Legal Assistance in Criminal Matters, signed at Washington on January 28, 1988, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof.

BACKGROUND

The negotiation of mutual legal assistance treaties [MLAT's], treaties designed to obtain evidence from abroad, represents a relatively new development in the area of international law enforcement. Negotiations on the first MLAT began over 17 years ago in response to increasing evidence that Swiss banks were being used to launder and hide organized crime money. In 1973, an MLAT between the United States and Switzerland was signed; it entered into force in 1977. In the first 8 years in force, over 300 requests from the United States had been handled by Swiss authorities. The treaty clearly has been and continues to be of assistance to American officials, but an extensive right of appeal available to those affected by American requests and the Swiss refusal to permit information provided by them to be used in tax evasion prosecutions have rendered the treaty less than a perfect instrument.

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Since that MLAT with the Swiss entered into force, MLAT's with the Netherlands, Turkey, and Italy have entered into force, as have a number of executive agreements in the same vein with the Cayman Islands, the British Virgin Islands, Montserrat, Anguilla, Turks and Caicos, Haiti, Nigeria, and the United Kingdom. Generally speaking, executive agreements have been limited to narcotics cases and have served as the first step toward agreement on a more expansive mutual assistance treaty. In addition, MLAT's have been negotiated with Colombia and Morocco, but each has been ratified by the United States only. At the present time, MLAT's with Canada, Thailand, the Bahamas, the Cayman Islands, Mexico, and Belgium have been signed but not yet ratified by the United States.

The traditional procedure for obtaining evidence from foreign countries is by the cumbersome, time-consuming and extremely limited process of letters rogatory, a process whereby written requests from the court of one country to the court of another asking the receiving court to provide evidence or some other form of assistance are made. Letters rogatory have been found lacking in that: (1) they fail to have the element of compulsion; (2) they produce evidence which is inadmissible in the requesting country's courts; and (3) the requested nation often lacks sufficient political will or incentive to comply with the other country's request.

MLAT's are a significantly more effective means of obtaining legal assistance. An MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases. An MLAT, either by itself or in conjunction with domestic implementing legislation, can provide a means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale narcotics trafficking operations. In an MLAT, the United States has the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts. Such procedures would include the use of certificates needed to admit foreign business records, or the opportunity for adequate direct and cross-examination of witnesses in depositions taken abroad. Finally, MLAT's are designed to streamline and make more effective the process of obtaining evidence. Each treaty provides for a Central Authority, the Justice Departments of the two countries, which is responsible for making and executing requests under the treaty.

MLAT's should add an element of standardization and uniformity to criminal procedures worldwide. The ability of criminals to hide the evidence and fruits of their crime will be diminished with the enhancement of the capacity of law enforcement agencies to cooperate across national boundaries in the investigation and prosecution of those crimes.

The Treaty between the United States and the Kingdom of Belgium on mutual legal assistance in criminal matters was signed on January 28, 1988. With Belgium, the United States had an opportunity to negotiate an MLAT with a European country that is a major commercial and financial center, and in doing so, to set the stage for MLAT negotiations with neighboring countries with legal systems quite similar to that of Belgium.

PURPOSE

The treaty provides for assistance in "all matters relating to the investigation, prosecution and suppression of offenses." The treaty thereby provides for assistance at the investigative stage (such as grand jury proceedings), as well as after formal charges have been filed. It also includes assistance for proceedings technically of a civil or administrative nature which are related to criminal prosecutions, such as forfeiture proceedings or a disgorgement action in a Securities and Exchange Commission case.

The treaty establishes the principle that assistance is available without regard to "dual criminality", that is whether the assistance requested relates to an act which would have constituted some criminal offense in the requested state, except a search and seizure in Belgium. The exception is necessary because Belgium has specific statutory law requiring dual criminality in order for a search and seizure to be conducted within Belgium for the benefit of another country.

The kinds of assistance provided for under the treaty include but are not necessarily limited to: provision of documents, records, and evidence; executing requests for searchs and seizures; obtaining witness testimony; and locating, tracing, immobilizing, seizing and forfeiting proceeds of crime.

COMMITTEE COMMENTS

The committee believes that Mutual Legal Assistance Treaties [MLAT's] are a key element in the U.S. strategy to improve international cooperation against crime, particularly narcotics-related offenses such as RICO, CCE, and money laundering. The Treaty with Belgium represents our first MLAT with a European country that is a major commercial and financial center, and sets the stage for MLAT negotiations with neighboring countries with legal systems quite similar to those of Belgium.

During committee consideration of the Treaty with Belgium, as well as the other five pending MLAT's, concern was expressed that the bilateral treaties could in some manner abridge the constitutional rights of U.S. citizens. A reservation was proposed to each of the MLAT's asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

The U.S. Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty," *Reid* v. *Covert,* 354 U.S. 1 (1957). Thus, the committee viewed the proposed reservation as unnecessary. As a matter of domestic law, the Constitution necessarily circumscribes the government's authority to act, and the courts could invalidate any unconstitutional action taken pursuant to the treaties whether or not such reservation were included in the instrument of ratification.

None of the MLAT's requires or authorizes legislation or other action which is prohibited by the Constitution, nor could they properly do so. The reservation thus adds nothing in the way of constitutional protection.

In addition, our treaty partners might well object because it is passed as a reservation with respect to our intended implementation of the treaty and will be expressly included in the instrument of ratification. Each of our treaty partners would have to accept it. Some of the pending six might not, and others with whom the United States wants to negotiate in the future may decline to do so if such a reservation is added at the time of ratification. More likely, some might insist on adding a reciprocal reservation, and that could limit the usefulness of the treaty for our purposes since constitutional limitations have different effects in different legal systems.

The reservation also raises dangerous litigation risks. It could provide a target for defendants as well as the targets of investigations to interpose specious challenges to MLAT requests where they could not now do so. They could also in effect substitute the actions of a foreign government for our own constitutional requirements when they carry out an MLAT request in their own country by permitting defendants to move to exclude evidence produced under an MLAT request because the procedure followed by the foreign government did not comport with those required by the Constitution.

Finally, the reasons why a similar reservation was adopted with regard to the Genocide Convention are inappropriate here. Unlike the Genocide Convention, the MLAT's do not create new grounds for which U.S. citizens can be tried. Instead, they establish mechanisms by which evidence can be obtained overseas in a form admissible in U.S. courts through such means as service of process, taking of testimony, admission of documentary evidence such as bank records, and the execution of requests for searches and seizures.

These are essentially procedural matters, already well regulated by the courts. In roughly a decade's experience under the existing MLAT's, no significant constitutional questions have arisen that would require inclusion of the reservation.

Finally, concern was raised that defendants in criminal cases are explicitly excluded from use of the Mutual Legal Assistance Treaties. The committee notes that nothing in this treaty is intended to negate the authority of the Court to ask the prosecution to make requests for information under the treaty.

Committee Action

On April 20, 1988, the committee held its first hearing on the six treaties relating to mutual legal assistance in criminal matters with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas, and Thailand. Testimony was heard from Administration witnesses, Mary V. Mochary, Principal Deputy Legal Adviser, Department of State, and Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice.

On June 14, 1988 the committee held another hearing at which the following public witnesses presented testimony:

Mr. Bruce Zagaris, Attorney, Berliner & Maloney, Washington, DC; Mr. Robert L. Pisani, Executive Director, International Legal Defense Counsel, Philadelphia, PA; Mr. Philip White, Attorney,

Adam, McCullough & Beard, Washington, DC. The hearing record on this treaty as well as the other five MLATs is printed as an appendix to the Committee report on the treaty with the Cayman Islands (Treaty Doc. 100–8).

The committee met to consider the Treaty between the Government of the United States of America and the Kingdom of Belgium on Mutual Assistance on September 27, 1988. Senator Helms offered a reservation to each of the pending treaties asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The Helms reservation to all the treaties was defeated by a 3–15 vote with Senators Helms, Pressler and Trible voting in the affirmative and Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Murkowski, Evans, and McConnell voting in the negative.

The committee voted by voice vote with a quorum present to report favorably the treaty with a resolution of ratification to the Senate for its advice and consent.

Section-by-Section Analysis

The following technical analysis, which was prepared by the U.S. negotiating team, constitutes the formal executive branch representation as to the meaning of this treaty and the obligations to be assumed by the United States under it:

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF BELGIUM ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

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TECHNICAL ANALYSIS
MUTUAL LEGAL ASSISTANCE TREATY BETWEEN UNITED STATES AND BELGIUM

INTRODUCTION

The following technical analysis of the Treaty on Mutual Legal Assistance in Criminal Matters, similar to treaties currently in force with Switzerland, Turkey, the Netherlands, and Italy[1*] and to treaties signed, but not yet ratified, with Canada, Mexico, Thailand, the United Kingdom concerning the Cayman Islands, and the Bahamas[2], was prepared by the U.S. delegation to those negotiations.

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* All notes follow the text.

TECHNICAL ANALYSIS OF THE TREATY

Article I -- SCOPE OF APPLICATION

The first paragraph of this Article, virtually identical to Article II(1) of the U.S. Mutual Legal Assistance Treaty (MLAT)[3] with Canada, establishes the basic obligation of the parties to provide assistance in "all matters relating to the investigation, prosecution and suppression of offenses." This obligation, which was intended to be as broad as possible, applies whether the case is still being investigated[4] or has already resulted in an indictment. It also includes assistance for proceedings technically of a civil or administrative nature which are related to criminal prosecutions, such as forfeiture proceedings.[5] Another example of such a civil or administrative proceeding is a disgorgement action in a Securities and Exchange Commission case. It was the intention of the Parties that neither the characterization of the proceeding nor the designation of the court in which the proceedings were brought would control whether assistance is available. Rather, the purpose of the proceeding is controlling; if the action is brought for the purpose of suppressing crime, assistance is available under the Treaty.

The second paragraph lists types of assistance the negotiators specifically discussed and intended to make available under the Treaty. Each of the listed items is discussed in detail hereinafter. The list is not exclusive, and other types of assistance not contrary to the provisions of the Treaty or prohibited by domestic law may be granted under the Treaty.

The third paragraph establishes the principle that assistance is available without regard to "dual criminality"[6] (i.e., whether or not the acts being investigated or forming the gravamen of the offense would have been illegal in the Requested State), "[u]nless otherwise provided by this Treaty." The latter provision was necessary because Belgium has specific statutory law requiring dual criminality in order for a search and seizure to be conducted within Belgium for the benefit of another country. See, the discussion of Article 7, Executing Requests for Search and Seizure. Thus, this provision eliminates dual criminality as a prerequisite for every form of assistance except a search and seizure in Belgium.

The term "offense" means any criminal violation punishable under the laws of the Requesting State regardless of the seriousness (grade, denomination, etc) of the offense. Any criminal violation, therefore, may serve as a basis for assistance. For the United States this includes federal offenses defined by 18 U.S.C. 2 as felonies, misdemeanors, or petty offenses.[7]

The fourth paragraph provides that the Treaty is for the benefit of the two Governments only. This is an express recognition that the Treaty is a law enforcement tool for use by the two states and is not intended to be utilized by nongovernment parties or institutions for purposes of discovery or otherwise. This is consistent with other mutual legal assistance treaties and reflects the Treaty's purpose -- to enhance the effectiveness of law enforcement authorities.[8] Government actions pursuant to the Treaty may benefit private parties (e.g., restitution to victims), but they remain actions controlled by the Governments to be used to effect law enforcement purposes. Private parties may continue to seek evidence in Belgium by means of letters rogatory, an avenue of international assistance that this Treaty leaves undisturbed. The paragraph also provides that the Treaty does not create a right for a defendant or other interested private party to obtain evidence, or a basis for such a person to argue for the suppression or exclusion of any evidence; nor does it create a basis upon which such a person could attempt to frustrate the execution of a request.[9] Thus, for example, a defendant may not seek to prevent the execution of a request seeking evidence or to suppress evidence provided pursuant to a treaty request on the basis that the provisions of the Treaty were not followed.

Article 2 -- Locating or Identifying of Persons

Under this Article, commonly found in MLATs, the parties agree to "make thorough efforts"[10] to locate or determine the identity of persons specified in the request.

Article 3 -- Serving Documents

The first paragraph of this Article provides that the Requested State agrees to serve judicial process and other

documents (e.g., a formal notice, summons, subpoena, writ) on persons and institutions located within its jurisdiction. The second paragraph provides that when the Requesting State wishes to have a document served requiring a response or appearance in the Requesting State, it must transmit the document to the Requested State early enough so that the person served will have a reasonable opportunity to comply. The third paragraph obligates the Requested State to return a proof of service to the Requesting State and specifies the form and content thereof.

During the negotiation of this and the next Article, the United States and Belgium specifically discussed whether this Article would provide the sole method for serving documents once this Treaty enters into force. Consistent with Article 19, the parties agreed that other methods of service may be used. Thus, the United States may, if it so desires, have its consular officers in Belgium serve, for instance, subpoenas issued under 28 U.S.C. 1783.

Article 4 -- Appearance of Witnesses and Experts in the Requesting State

The Requested State is obliged by the first paragraph of this Article to contact "a [fact] witness or expert [witness]" whose presence in the Requesting State is "particularly necessary"[11] and to invite that person to travel to the Requesting State. The Requested State is also obliged to inform the Requesting State of the person's response promptly.

The second paragraph obligates the Requesting State to "appropriately" reimburse the witness for travel costs and subsistence. The negotiators intended the word "appropriately" to mean that which is normally paid pursuant to the domestic law of the Requesting State. The paragraph further provides that the Requesting State is obligated to advance necessary travel funds to the witness or expert, if requested, and that the funds may be provided through the embassy of the Requesting State.

Paragraph 3 clarifies that an appearance in the Requesting State under this Article is not mandatory and the invitation may be refused by the prospective witness without penalty. The Requested State is not obligated to compel the person to travel to the other country and the person is not otherwise obligated to

comply with the directions contained in a summons served on him under this Article.

Article 5 -- Providing Information and Items in the Possession of Government Offices or Agencies

This Article provides that "information and items" -- potential evidence in any form whatever -- in the possession of one government are made available to the other for criminal justice purposes. The term "government office or agency" includes executive, judicial, and legislative units of the federal, state, and local levels of government. Examples of the types of government documents and records to be made available are ship registrations, court records (including records of convictions), police records, immigration records, articles of incorporation, property records, hotel records, telephone records, passport applications, tax information, automobile registration information, driver's licence information, customs information, and birth and death records.

Paragraph (a) obligates the Requested State to produce publicly available "information and items, including documents or records," upon demand. Paragraph (b) authorizes the Requested State to provide "information and items, including documents or records" in its possession but not publicly available "to the same extent and under the same conditions as [they] would be available" to domestic law enforcement and judicial authorities. Both Parties contemplate that copies, rather than originals, will suffice. See, Article 16(3).

In discussing paragraph (b), the United States delegation explained the significance of 26 U.S.C. 6103(k)(4) to the Belgian delegation, indicating that if the negotiators agreed that the Treaty covered tax offenses and was intended to be a vehicle by which tax information could be provided, then the United States could give Belgium assistance when it needed information in the possession of the IRS which otherwise could not be furnished. The Belgian delegation responded that the assistance it intended to grant included tax information which is available to domestic law enforcement authorities; indeed, Belgium made the point that it is prepared to use search warrants as necessary in order to obtain such information for the United States under this Treaty. The United States delegation was, therefore, satisfied with the understandings and agreements so as to make this Treaty a

"convention relating to the exchange of tax information" within the meaning of 26 U.S.C. 6103(k)(4).

As opposed to paragraph (a), the provision of assistance under paragraph (b) is discretionary. For the United States, the exercise of this discretion rests with the governmental unit in possession of the non-public information. However, the United States intends that discretion to deny assistance will be sparingly exercised and only for reasons clearly definable to the U.S. Central Authority. For Belgium, non-public information not voluntarily provided by the governmental unit in possession thereof must be secured by search warrant. See Article 7. As indicated above with respect to tax information, Belgium is willing to use search warrants where necessary. Thus, the discretionary determination will rest with the Belgian executing authority rather than with the governmental unit.

Article 6 -- Taking Testimony and Producing Documents in the Requested State

The first paragraph of this Article obligates the Requested State to use court process, if necessary, to compel persons to appear, testify, and produce documents upon the request of the Requesting State.[12]

The reference in the first paragraph to execution of the request "in accordance with the requirements of the law of the Requested State" takes into account testimonial privileges and immunities, as well as procedural matters. The negotiators agreed that the Requested State should make rulings on assertions of privileges and immunities available under the law of the Requested State but not with regard to those available under the law of the Requesting State. Assertions of those privileges and immunities are, instead, to be preserved for decision by the courts of the Requesting State. The question of whether failure to raise a claim constitutes a waiver is left to the law of the Requesting State as well.[13]

The second paragraph obligates the Requested State to notify the other State of the date and place where the request will be executed.

The third paragraph obligates the Requested State to permit the accused, his attorney, and "any other interested person

specified in the request" to be present at the execution of the request. "Interested person" includes a prosecutor, case agent, expert, special master, etc. Note that the Requested State need not grant the accused safe conduct to attend the taking of testimony. If the accused chooses to enter the Requested State in which he may be subject to incarceration or detention, the accused accepts that risk. Generally, the United States is able to get permission for suitable arrangements not requiring the presence of the accused (i.e., telephone connection between him and his counsel present at the proceeding).

The final paragraph gives persons permitted to be present the opportunity to pose questions for the witness to answer, in accordance with applicable procedures in the Requested State.[14] Under Belgian law and practice, it is anticipated that the judicial officer responsible for executing the request may either require all of the questions to be given to him so that he can ask them of the witness or, if he so chooses, he may allow the persons present to question the witness directly.[15]

Article 7 -- Executing Requests for Search and Seizure

This Article obligates each State to conduct searches and seizures at the request, and for the benefit, of the other. The requirement that the search and seizure be executed in accordance with the law of the Requested State is understood, on the U.S. side, to include Constitutional requirements.

Belgian law allows its authorities to conduct a search and seizure for another country only for an "extraditable" offense, meaning that there must be dual criminality and the offense must be punishable in both States by more than one year in prison. The Belgian delegation assured the United States delegation that in determining dual criminality, Belgium would look only to the essential elements of the offense and would not consider as essential an element such as use of the mails, interstate or foreign commerce, etc., since those elements are commonly found in the United States statutes solely for federal jurisdictional purposes.[16]

The second paragraph grants the Requested State authority to condition the delivery of seized items to the Requesting State on assurances that they will be returned promptly. The provision makes clear that in the absence of such conditions, the Requested

State is not obligated to return the property and may dispose of it as provided by its law (e.g., through forfeiture, restitution, etc.).

The last paragraph grants the Requested State authority to fashion appropriate conditions prior to transferring seized items to the Requesting State in order to make sure that the interests of a third party in that property are protected.

Article 8 -- Procedures Concerning Admissibility of Evidence

This Article, which was included primarily for the benefit of the United States, ensures that Belgian authorities will certify or authenticate the requested items, including documents and records, in a manner designed to establish a proper foundation for their admission into evidence under U.S. law.

The first paragraph of this Article permits the United States to specify the procedures to be followed and the forms to be used for the certification or authentication of the items in executing a request under Article 5, 6, or 7.[17] By way of example, the United States intends to ask Belgium to certify "records of a regularly conducted activity," as defined by 18 U.S.C. 3505, pursuant to a "3505" form supplied by the United States.[18] Belgium is required to honor the terms of the request unless doing so would be in violation of its law.[19]

The second paragraph establishes procedures to be used in order for items seized by Belgium to be admitted into evidence in the United States without having to establish the chain of custody by means of deposition or live testimony. After a search warrant is executed in Belgium, the evidence seized is taken to the Clerk of the Court which issued the warrant. The Clerk will keep the evidence until it is given to the designated United States agent and will, also, provide attestations using the form appended to the Treaty (a copy of which is included in the appendix to this analysis) executed by each person who had possession of the items at any time after they were seized. While the form will not be executed under oath or before a notary or magistrate in Belgium, the person executing it would be subject to prosecution in Belgium if he gives false information. The penalty would be punishment by imprisonment for 5 to 10 years if the person executing it is not a governmental official (e.g., the owner of a garage in which a seized automobile was kept); if

he is a governmental official, the penalties would be even greater.

The second paragraph further provides that those attestations shall be admissible in evidence in the United States "as proof of the truth of the matters set forth therein" and that no further "attestation shall be required." The purpose of this is two-fold: first, to indicate that the courts retain full authority to rule on the admissibility of the proffered evidence with regard to materiality, relevance, etc.; second, as a direction to the courts that, if the seized items have been provided pursuant to this paragraph and are otherwise admissible, they should not be excluded because the attestation is technically or substantially different from other recognized forms of certification or authentication. No implementing legislation is needed; the prosecutor will move admission of the attestation(s) under rule 803(24) of the Federal Rules of Evidence.

During the negotiations, careful thought was given to the feasibility of appending other standard certification forms to the Treaty, as has been done in other MLATs. For instance, our MLAT with Thailand[20] provides forms to certify business records (Article 8(5)) and records of a government office or agency (Article 9(3)), as well as articles seized pursuant to a search and seizure (Article 11(2)). Ultimately, the negotiators agreed not to include those forms in favor of making the Treaty as flexible as possible.

In this connection, other types of certifications and authentications the United States intends to request of Belgium in order to provide a foundation for evidence obtained under the Treaty include those:

1. established or permitted by the Rules of Evidence or by a statute such as 18 U.S.C. 3505;[21]

2. contained in or appended to other MLATs ratified by the United States in a similar manner and for the same purpose as provided in those treaties[22], examples of which are included in the appendix to this analysis; and

3. available under other treaties and multilateral conventions currently in force or which may enter into

force relating to certification, authentication, or legalization of documents.[23]

As noted previously, implementing legislation is unnecessary inasmuch as it is intended that established procedures will be followed for offering and determining admissibility of evidence so certified or authenticated. See, e.g., 18. U.S.C. 3505 and Rules 804(b)(5) and 901 of the Federal Rules of Evidence.

The last paragraph in this Article, paragraph 3, is an instruction to the Central Authorities to consult with regard to difficulties arising under this Article. This provision is included primarily for the benefit of Belgium which indicated concern about whether its Central Authority would be able to understand our requests in light of its having no experience in dealing with common law rules of evidence. Moreover, Belgium contemplates that its executing authorities will work closely with U.S. law enforcement authorities in executing requests for search and seizure so that chain of custody requirements pose minimal administrative burdens for Belgium. However, in such instances, the U.S. Central Authority must be involved and cannot simply delegate its responsibility to the U.S. law enforcement authority involved.

Article 9 -- Transferring Persons in Custody in the Requested State to the Requesting State

and

Article 10 -- Transferring Persons in Custody in the Requesting State to the Requested State

These two Articles deal with the situation in which a person incarcerated in one State is needed as a witness or for confrontation or other purposes in the territory of the other. On some occasions ad hoc arrangements are made to permit the person to be escorted to the other country, testify at the trial or other proceeding, and then return to the country of incarceration.[24] These Articles establish the procedures for this to occur on a routine basis. Article 9 provides for a person incarcerated in the Requested State to travel to the Requesting State, commonly to appear as a witness at trial. Article 10 provides for a person incarcerated in the Requesting

State to travel to the Requested State, commonly for purposes of confrontation.

Both Articles allow transfer of such a person, provided both the Requested State and the person to transfer consent. It is noted that the Treaty does not alter the right of either Party to refuse to permit a transfer. There have been recent situations in which a person in custody in the United States has demanded permission to travel to another country to be present at a deposition being taken there in connection with his case.[25] These demands are often denied by the foreign country involved, and it was not the intention of the negotiators to interfere in any way with each Party's unfettered discretion to accede to or deny such requests.

Article 9 provides in paragraph two that the Requested State may postpone transfer of a person for such length of time as his presence in the Requested State is necessary in connection with an ongoing investigation or prosecution. Both Articles authorize the State into which the person transfers to keep him in custody while he is there and to return him to the other as soon as possible (unless the two States agree otherwise). Neither State may refuse to return such a person because of his nationality.

Article 11 -- Application of Articles 9 and 10

This Article reflects agreements concerning implementation of Articles 9 and 10 and specifies some additional obligations arising in a transfer situation.

The first paragraph establishes that the person transferred is entitled to have the time spent on transfer credited against his sentence so that he is not penalized for agreeing to cooperate. It further grants safe conduct (i.e., the prisoner cannot "be prosecuted, detained or subjected to any other restriction of personal liberty" for acts or convictions which occurred prior to transfer).[26] This protection lasts for a period of 15 days after the person has had "an opportunity to leave the State to which he has been transferred," thus providing for the situation in which the sentence imposed by the country from which the prisoner was transferred expired while he was in the receiving State. The protection also expires when the person departs (voluntarily or under compulsion) from the State into which he had transferred.

The second paragraph obligates the receiving State to arrest the transferred person if he escapes while on transfer. The last paragraph provides that extradition proceedings are not required in order to effect the return of a person who has been transferred.

Article 12 -- Proceeds of Crime and Restitution to Victims

This Article dealing with restitution to victims and locating, tracing,[27] immobilizing, and forfeiting the proceeds of crime[28] was the subject of protracted discussions during the negotiations.[29] Both Parties intended for the Treaty to provide as much assistance as possible under current laws and also under such new laws as may be enacted in the future in this rapidly developing area of criminal justice. Thus, the obligation to assist includes all types of assistance, except that neither Party agreed to be obligated by the Treaty to: (1) transfer forfeited property to the other State; (2) transfer property to the other State where forfeiture proceedings would be instituted; or (3) institute and prosecute claims on behalf of the other State for forfeiture or claims for restitution.

The United States delegation explained that the Anti-Drug Abuse Act of 1986[30] ("the Act"), expanded the authority of the United States to allow it to seize and forfeit property

> which represents the proceeds of an offense against a foreign nation involving the manufacture, importation, sale,or distribution of a Controlled Substance (as such term is defined for the purposes of the Controlled Substances Act) within whose jurisdiction such offence or activity would be punishable by death or imprisonment for a term exceeding one year and which would be punishable by imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States. [18 U.S.C. 981(a)(1)(B).]

The Belgian delegation indicated that Belgium would be able to grant assistance to the United States in locating, tracing, and immobilizing assets forfeitable under this new law. It further indicated that it would assist in the forfeiture of such assets

by providing evidence (including documents and records) needed to establish the property's forfeitability.

The United States delegation also explained that this Article would permit the equitable sharing of forfeited assets pursuant to 18 U.S.C. 981. Under regulations to be promulgated by the Attorney General, an equitable share will generally reflect the direct or indirect contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The Act requires that these provisions operate only "to the extent provided for by Treaty" and pursuant to "treaties providing for the transfer of forfeited properties to the foreign country." 18 U.S.C. 981(a)(1)(B) (1986).

The second paragraph of this Article obligates each State to notify the other State of proceeds of crime believed to be located in the territory of the other State and for the State notified to determine whether any action would be appropriate and report to the other as soon as possible on the action taken.

Article 13 -- Limitations on Assistance

The first paragraph of this Article establishes three bases upon which the Requested State may refuse to grant assistance: (1) execution of the request would prejudice the sovereignty, security or other essential public interests of the State; (2) the request relates to an offense under military law which would not be an offense under ordinary criminal law; or (3) the request was not made in conformity with the Treaty.

The first is intended to allow the Requested State to avoid granting assistance which would be offensive to its basic institutions, violate its notions of fundamental justice and fair play, or threaten its security. It is not intended to permit refusal of a request for inconsequential reasons. The Belgian delegation equated this in part to the concept of ordre public. Denial on this basis for Belgium would require a finding by the Belgian Central Authority that granting assistance would affect a public institution in a particularly disruptive manner.

The second basis relates to military offenses: a request for assistance in the investigation or prosecution of a military offense may be refused if the offense is one not found in

ordinary criminal law. For instance, assistance should be granted under this provision in a case involving a serviceman being court martialed for theft; the Requested State, however, could refuse assistance if he were being court martialed for insubordination.

The final basis for refusal established by paragraph one is that the request was not made in conformity with the Treaty. The importance of this clause, aside from the obvious, is that of expressly granting the Requested State authority to waive defects.

The second paragraph establishes another basis for refusing assistance, allowing the Central Authority of the Requested State to deny a request "if it involves a political offense." However, the paragraph also states expressly that assistance should not be denied for offenses which Belgium and the United States have agreed in other agreements not to consider political. This paragraph was proposed by the Belgian delegation and discussed at length. The United States delegation posed four situations involving potential political offenses in order to obtain a better understanding of how Belgium would apply this paragraph:

1. An espionage case [involving a foreign agent of a third state (unfriendly to both the United States and Belgium) spying on NATO headquarters]: the Belgian delegation indicated that assistance would be granted;

2. An export control case [involving a foreign agent of a third state (unfriendly to both the United States and Belgium) illegally shipping arms from the United States through a front in Belgium to that third state]: the Belgian delegation indicated that assistance would be granted;

3. Another espionage case [involving an unauthorized entry into government data banks (computer crime)]: the Belgian delegation indicated that assistance would be granted; and

4. An investigation into a government's handling of its responsibilities [involving an investigation similar to the Irangate investigation]: the Belgian delegation indicated that assistance could be granted (depending on how much information was available showing that a crime ordinarily found in the criminal codes of free

and democratic societies was being investigated) but that this would be the most difficult case of the four.

As these responses show, the language used in this Treaty means something different from similar language found in extradition treaties.[31] It allows the Requested State to avoid becoming embroiled in political matters of the Requesting State and allows the Requested State to refuse assistance for requests which are motivated by improper political considerations.[32] It is not intended, however, to prevent assistance from ordinarily being given in cases involving espionage, sabotage, and treason.[33]

The second sentence of this paragraph, relating to offenses not considered political under other international agreements, is principally a reference to the Extradition Treaty and its Protocol signed by the United States and Belgium in 1987.[34] Those two agreements, read together, exclude from the definition of political offenses those crimes of violence typically associated with terrorism. They also exclude crimes against the head of state or his family and crimes included in multilateral conventions to which both states are parties which provide that the culprit must be either extradited or prosecuted.

It is noted that the Treaty does not obligate the Requested State to deny assistance for any of the foregoing reasons. Instead, it empowers the Requested State to deny assistance as a matter of discretion. This discretionary authority to grant or deny assistance was explicitly given to the executive branch rather than to the judiciary. The primary reason for this is that not all forms of assistance involve the courts.[35] It is noted that the court has inherent authority to satisfy itself that the Central Authority made its decision after fully considering all relevant issues. The court may not, however, substitute its discretion for that of the Central Authority under this language.[36]

The third paragraph provides that before the Requested State either denies or postpones a request, it must consult with the Requesting State to see if a satisfactory arrangement can be devised to permit immediate assistance. Any agreement reached in these consultations conducted through the Central Authorities must be respected. The fourth paragraph allows the Requested State to postpone (but

not deny) assistance in order to avoid interference with an investigation or prosecution in the Requested State. The last paragraph provides that the Central Authority of the Requested State must promptly inform the other Central Authority of the reason for denying or postponing a request.

Article 14 -- Protecting Confidentiality

This Article obligates the Requested State to keep the contents of a request confidential if the Requesting State so requests. If compliance with the request is not possible, the Requested State is to consult with the Requesting State concerning whether to proceed with execution.

In discussing this provision, the negotiators considered whether the Treaty should regulate the use to which the Requesting State may put the evidence or information it receives. It was agreed that the Treaty would not contain any such restrictions, thus allowing the Requesting State to use the evidence or information for any purpose. Given that the Treaty requires dual criminality only for search and seizure in Belgium, use restrictions, at least insofar as such limitations would apply to other criminal offenses, are rather meaningless. The Central Authorities need be concerned only that the initial request is for a proper purpose under the Treaty. See Article 15(1)(d). However, conditions imposed in accordance with Article 5(b) may restrict subsequent use by the requesting State.

Article 15 -- Contents of Requests

This Article is a self-explanatory listing of items to be included in requests. The information to be provided is similar to that required for requests in other U.S. MLATs and is virtually identical to Article 13 in the U.S.-Netherlands MLAT.[17]

Article 16 -- Executing Requests and Return of items

The first paragraph of this Article obligates the Central Authority of the Requested State to execute the request itself or send it to the appropriate competent authority for execution promptly. The Treaty contemplates that the Central Authority which receives a request will first review it and, if it is of the opinion that the request does not comply with the Treaty's terms, immediately notify the Central Authority of the Requesting State. If the request does satisfy the Treaty's requirements and the Central Authority can provide the assistance itself, that authority will comply with the request promptly. If the Request meets the Treaty's requirements but its execution requires action by some other authority in the Requested State, the Central Authority will promptly transmit it to that authority, which is obligated to use its best efforts to execute it. U.S. federal agents, attorneys, and courts will normally execute Belgian requests. State and local authorities are also bound to assist when necessary (for instance, when records of convictions from local courts are requested). The authority executing the request is authorized to take whatever action within its power is necessary in order to execute it.

The paragraph also provides that the courts of the Requested State shall have jurisdiction to issue necessary process. This provision serves several different purposes. First, it authorizes state and local courts, to the extent that they are called upon to execute a request, to issue necessary process. Second, it provides slightly broader authority than 28 U.S.C. 1782 for U.S. federal courts to use their power to issue subpoenas and other process when Belgium needs evidence for use before an administrative agency, as might be the case in connection with a Belgian forfeiture proceeding under Article 12 of the Treaty.[38]

Article 16(2), identical to Article 12(2) of the U.S.-Netherlands treaty,[39] provides that the Requested State is to execute the request pursuant to its own laws, practices, and procedures, except that specific procedures asked for in the request will be honored unless prohibited by domestic law. For instance, if the Requesting State asks that a deposition be video taped, the Requested State should do so unless its law prohibits video taping such proceedings.

The third paragraph allows the Requested State to substitute copies of documents for originals unless the Requesting State specifically requests that the originals be provided. The last paragraph obligates the Requesting State to return any items furnished, unless the Requested State waives their return, except for items seized pursuant to a search warrant, in which case arrangements for their return are to be made pursuant to Article 7(2), as discussed previously.

Article 17 -- Central Authorities

The Attorney General of the United States and the Minister of Justice of Belgium are the Central Authorities for purposes of the Treaty.[40] The scheme established by the various provisions of the Treaty calls for them to exercise control over the making of requests, to determine whether the requests meet the requirements of the Treaty and, if not, whether to grant assistance as a discretionary matter. The provision in this Article that they shall communicate directly with each other ensures that they remain in close contact with regard to the implementation of the Treaty and the processing of individual cases.

Article 18 -- Costs and Translations

This Article dealing with costs and translations is self-explanatory.

Article 19 -- Other Treaties and Domestic Laws

This Article provides that assistance available under the Treaty may also be provided pursuant to other agreements, arrangements, or practices. This is to ensure that existing and future working arrangements are not affected in any manner by this Treaty.

Article 20 -- Entry into Force and Termination

The last article contains standard language concerning ratification, the exchange of instruments of ratification, entry into force, retroactivity, and termination of the Treaty.

APPENDIX

FORM 41

I, the undersigned, ___[Name and Title or Position]___, attest on penalty of criminal punishment for false statements or attestation that I:

-- seized the articles listed below from ___[person]___ on ___[date]___ at ___[place]___ *

-- received custody of the articles listed below from ___[person]___ on ___[date]___ at ___[place]___ *

Description of articles:

I declare that I relinquished custody of these articles on ___[date]___ at ___[place]___ to: ___[Name(s) Title or Position]___.

I declare that, while they were in my custody, these articles were:

-- in no way altered. *

-- altered in the following manner: *

DONE this _____ day of _____, ____, at ___[place]___.

___(signature)___

* cross out the inapplicable statements

APPENDIX

CERTIFICATE OF AUTHENTICITY OF BUSINESS RECORDS [42]

I the undersigned: _____,

understanding that I am subject to criminal penalty under the law of Belgium for an intentionally false declaration, declare that I am employed by/associated with: _____

_____ in the position of: _____

and by reason of my position am authorized and qualified to make this declaration.

I further declare that the documents attached hereto are originals or true copies of records which:

1. were made, at or near the time of the occurrence of the matters set forth therein, by (or from information transmitted by) a person with knowledge of those matters;
2. were kept in the course of a regularly conducted business activity;
3. were made by the said business activity as a regular practice; and,
4. if not original records, are duplicates of original records.

The originals or duplicates of these records are maintained in the country of: _____.

Date of execution: _____

Place of execution: _____

_____

[signature]

APPENDIX

ATTESTATION OF AUTHENTICITY OF FOREIGN PUBLIC DOCUMENTS [43]

I, [Name], attest on penalty of criminal punishment for false statement or attestation that my position with the Government of Belgium is [Official Title] and that in that position I am authorized by the law of Belgium to attest that the documents attached and described below are true and accurate copies of original official records which are recorded or filed in [Name of Office or Agency], which is a government office or agency of Belgium.

Description of Documents:

[Signature]

[Title]

[Date]

ENDNOTES

1. Treaty between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1971, 27 UST 2019, TIAS 8302 (entered into force January 23, 1977); Treaty between the United States and the Republic of Turkey on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, 32 UST 311, TIAS 9891 (entered into force January 1, 1981); Treaty between the United States and the Kingdom of the Netherlands, together with a Related Exchange of Notes, June 12, 1981, TIAS 10734 (entered into force September 1, 1983); Treaty between the United States and the Italian Republic on Mutual Assistance in Criminal matters, together with a Related Memorandum of Understanding, November 9, 1982, TIAS ____ (entered into force November 13, 1985).

2. Treaty between the United States and Canada on Mutual Legal Assistance in Criminal Matters, March 18, 1985; Treaty between the United States and the United Mexican States on Cooperation for Mutual Legal Assistance, December 9, 1987; Treaty between the United States and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, March 19, 1986; Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands on Mutual Assistance in Criminal Matters, July 3, 1986; Treaty between the United States and the Bahamas on Mutual Assistance in Criminal Matters, June 12, 1987, and August 18, 1987.

3. See, note 2.

4. Both delegations agreed that the term "investigation" includes grand jury proceedings, and investigations prior to grand jury proceedings, in the United States. Moreover, administrative investigations are also covered, provided that the administrative proceedings are related to criminal prosecutions (e.g., forfeiture proceedings).

5. The negotiators specifically agreed that this agreement does not establish a basis for assistance for general civil, commercial, or administrative matters (i.e., those matters unrelated to the suppression of offenses).

6. Dual criminality is a principle often found in extradition treaties generally prohibiting extradition if the conduct forming the gravamen of the offense in the Requesting State would not have been illegal if performed within the jurisdiction of the Requested State. See Collins v. Loisel, 259 US 309, 312 (1922); Cucuzzella v. Keliikoa, 638 F.2d 105, 108 (9th Cir. 1981).

7. It was agreed, nevertheless, that the Central Authority of the Requesting State has authority to screen requests to ensure that only those worthy of international judicial assistance will be presented.

8. This provision may be unnecessary inasmuch as the Central Authority of the Requested State has the ability under Article 13(1)(a) to refuse such requests as contrary to the public interest of the State. Nevertheless, including this provision in the Treaty was felt to be desirable in that it (1) constitutes a directive to the Requesting State not to make such requests and (2) reduces the number of instances in which the Requested State will find it necessary to invoke its authority to refuse a request as being contrary to the public interest, preserving that

provision's use for cases more clearly involving matters of national security, etc.

9. This clause reflects the desire of the negotiators to avoid the creation of new rights or the alteration of existing rights available to the defense or private parties. Simply stated, this means that a private party wishing to oppose execution of a request must base his opposition on something other than the provisions of the Treaty; if a private party wishes to suppress or exclude evidence obtained under the Treaty, he must base his arguments on something other than the provisions of the Treaty.

10. The phrase "make thorough efforts" was agreed to mean that the parties are required to do what is reasonable under the circumstances to locate or identify the individual.

11. The determination of whether the person's presence is "particularly" necessary is to be made by the Requesting State.

12. Belgium has authority under its law to compel a witness to appear and give a statement under oath (either prior to or after filing of charges). If the statement is taken under oath and the witness lies, he can be prosecuted for perjury.

13. See, e.g., R. & J. Dick Co. v. Bass, 295 F.Supp. 758 (N.D. Ga. 1966), a case involving a federal court in Georgia in a diversity action being requested by a Pennsylvania court to take the deposition of persons located in Georgia who had no privilege under Georgia law to refuse to testify but might have a privilege under Pennsylvania law (where the suit was pending).

It is noted that the court may protect the witness' rights under foreign law by an appropriate order, if necessary. For instance, in the R. & J. Dick Co. case, supra, the court ordered:

> IT IS ORDERED, therefore, that the deposition proceed, but solely upon the condition that all copies thereof, when transcribed, be sealed and delivered to the clerk of this court, and that the contents thereof be not divulged or disclosed by either of the parties or their counsel to any other person or persons pending a ruling by the court as to what portions of such deposition, if any, shall be admitted in evidence.

14. These two paragraphs grant the United States rights not currently existing in Belgian law. Under Article 73 of the Belgian Code of Criminal Procedure, a witness is heard in secret, and counsel for the accused is not permitted to question him. Therefore, these paragraphs change Belgian law to assure that the United States requirements with regard to cross-examination of the witnesses are met.

15. Current Belgian practice is for the judge to control the taking of testimony and ask all questions. In fact, the Belgian proceeding is inquisitional and not adversarial and, therefore, providing an opportunity for a defendant or counsel to pose questions, or even to be present, is a substantial change in Belgian practice. When a deposition is taken in Belgium pursuant to the Treaty, the defense should anticipate preparing written questions to be provided to the examining magistrate in advance of the deposition. This requirement is not uncommon to depositions taken in

other foreign jurisdictions.

16. The U.S. delegation noted that the new U.S.-Belgium extradition treaty has a "federal jurisdiction" clause and inquired whether such a provision was necessary in this Treaty; the Belgian delegation indicated that it would not be necessary and assured the U.S. delegation that the U.S. statutes would be properly construed under both treaties.

In this regard, on October 23, 1987, the U.S. delegation gave the Belgian delegation copies of the following U.S. statutes, translated into French, for the purpose of discussing them to make certain that the U.S. could reasonably expect to receive assistance, including a request for search and seizure, for any investigation or prosecution arising under:

TITLE 18 OFFENSES:

1. 18 U.S.C. 2
2. 18 U.S.C. 371
3. 18 U.S.C. 1341
4. 18 U.S.C. 1961
5. 18 U.S.C. 1962
6. 18 U.S.C. 1963
7. 18 U.S.C. 2314
8. 18 U.S.C. 3282

DRUG OFFENSES:

9. 21 U.S.C, 812
10. 21 U.S.C. 841
11. 21 U.S.C. 843(b) and (c)
12. 21 U.S.C. 846
13. 21 U.S.C. 848
14. 21 U.S.C. 952
15. 21 U.S.C. 960
16. 21 U.S.C. 963

TAX OFFENSES:

17. 26 U.S.C. 7201
18. 26 U.S.C. 7203 [although dual criminality exists, this offense is a misdemeanor and Belgium cannot, under its law, provide assistance involving a search and seizure if it is the only offense at issue]
19. 26 U.S.C. 7206

CODE OF FEDERAL REGULATIONS

20. 21 C.F.R. 1308.11
21. 21 C.F.R. 1308.12

Whether U.S. law likewise requires dual criminality in order for U.S. authorities to execute a search warrant on behalf of a foreign authority is a question which has yet to be addressed by our courts. Therefore, the negotiators have been careful not to include a dual criminality requirement for the United States in the Treaty but, also, to use language to avoid having the provision found to be unconstitutional in the event a court does determine dual criminality to be constitutionally required. Specifically, the sentence "The search and seizure shall be carried out in accordance with the laws of that State" is intended to mean that the foreign request must, among other things, comply with our constitutional requirements. The opening phrase, "To the extent permitted under its laws. . ." has also this same intention.

ENDNOTES

17. This Article is primarily for the benefit of the United States inasmuch as Belgian rules of evidence rarely require foundations to be laid or for other formalities to be met in order for the material to be used as evidence. To the extent that Belgium does make requests for specific procedures under this Article, of course, the United States is equally bound to honor them.

18. See United States v. Miller, 830 F.2d 1073 (9th Cir. 1987).

19. In discussing this matter with the Belgian delegation, the United States delegation was unable to hypothesize a request for special procedures necessary under U.S. law which would be violative of Belgian law. This is not to say that the special procedures would not be cumbersome.

20. Treaty between the United States and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, signed at Bangkok on March 19, 1986.

21. The form in the appendix, CERTIFICATE OF AUTHENTICITY OF BUSINESS RECORDS, is based on the form used in United States v. Miller, 830 F.2d 1073 (9th Cir. 1987). The court in Miller found the records so certified to have been properly admitted into evidence pursuant to 18 U.S.C. 3505.

22. See the forms contained in the Treaty between the United States and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, signed at Bangkok on March 19, 1986; the Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands on Mutual Assistance in Criminal Matters, signed at Grand Cayman on July 3, 1986; and the Treaty between the United States and the Bahamas on Mutual Assistance in Criminal Matters, signed at Nassau on June 12, 1987, and August 18, 1987.

23. An example is authentication under the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, done at the Hague October 5, 1961, entered into force for the United States October 15, 1981, T.I.A.S. 10072, 527 UNTS 189. Documents so authenticated would be offered for admission under Rule 902(3) of the Federal Rules of Evidence.

24. For example, on January 23, 1986, federal prisoner Edward Hayes Ward was temporarily released from the Federal Correctional Institution at Talladega, Florida, to travel to Nassau, the Bahamas, and testify for the Government at a preliminary inquiry in the case of Commissioner of Police v. George Smith and Everette Bannister, Case No. 4948-85. Ward was accompanied by DEA agents, who saw to his security and insured his prompt return to the United States when his testimony was no longer needed.

25. See, United States v. Sines, 761 F.2d 434 (9th Cir. 1985); cf. United States v. Johnpoll, 739 F.2d 702 (2nd Cir. 1984); United States v. King, 552 F.2d 833 (9th Cir. 1976).

ENDNOTES

26. See, discussion of Article 4 with regard to an explanation of safe conduct in which it is noted that safe conduct is not provided for witnesses not incarcerated who voluntarily travel to the Requesting State.

The Belgian delegation proposed inclusion of this safe conduct provision for prisoners who have been transferred under either articles 9 or 10. The United States delegation agreed, perceiving this situation to be somewhat different from that involving potential witnesses who are not in custody.

27. The words "locate" and "trace" are both used to make clear that assistance under this article includes locating the property physically, as well following the proceeds through transactions (e.g., from cash to jewelry to real estate).

28. The term "proceeds of crime" is intended to include all property obtained directly or indirectly as a result of the commission of an offence (e.g., art work purchased with drug profits).

29. It was specifically agreed that assistance under this Article would not include the recognition and enforcement of fines. Whether assistance such as assisting the Requesting State locate funds within the territory of the Requesting State from which a fine might be satisfied (e.g., a situation in which the United States needs bank records from Belgium in order to trace the defendant's assets to an account in the United States) was not discussed. It is the belief of the U.S. negotiators that the language of the Treaty appears broad enough to allow such assistance and should be granted (absent an express prohibition in the domestic law of the Requested State).

30. Pub.L. 99-570, Title I, Section 1366(a), October 27, 1986, 100 Stat. 3207.

31. For a discussion of "political offense" as that term is commonly used in extradition situations, see, Quinn v. Robinson, 783 F.2d 776, (9th Cir. 1986), cert. den., __ U.S. __, 107 S.Ct. 271; Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).

During the negotiations sound policy reasons for distinguishing between giving assistance under a mutual legal assistance for a political offense and extraditing a person for a political offense were noted.

In the first place, international law, as reflected in the Protocol Relating to the Status of Refugees, done at New York January 31, 1967, entered into force for the United States November 1, 1968, 19 UST 6223, TIAS 6577, 606 UNTS 267, prohibits returning a person to a country where he will be persecuted unless he has committed a serious "non-political" offense; usually whether the offense was political or not is determined during the course of an extradition hearing. There is no similar body of law with regard to mutual legal assistance.

In the second place, since Belgium and the United States are close allies, it is in the interests of both states to make available evidence and information useful in prosecuting persons who have committed espionage, sabotage, or treason, or who are involved in illegally shipping high technology equipment to unfriendly nations. Further, it is noted that currently there is no prohibition in the domestic law of either State against rendering assistance in such cases; thus, any prohibition in the Treaty would be novel and counterproductive.

ENDNOTES

32. Extradition law has long distinguished between political offenses focusing on the nature of the offense and political motivation focusing on the reasons the state requesting extradition made the request. For cases discussing "political motivation" in the extradition context, see, Sindona v. Grant, 619 F.2d 167 (2nd Cir. 1980); Jhirad v. Ferrandina, 536 F.2d 478 (2nd Cir. 1976), cert. den., 429 U.S. 833.

33. It is noted that in extradition law these offenses are generally considered to be "pure" political offenses for which extradition must be denied. See Quinn v. Robinson, 783 F.2d 776, 793-94 (9th Cir. 1986), cert. den., __ U.S. __, 107 S.Ct. 271.

34. Supplementary Treaty on Extradition to Promote the Repression of Terrorism between the United States and Belgium, signed in Washington, D.C., on March 7, 1987; Treaty between the United States and Belgium on Extradition, signed in Brussels on April 27, 1987.

35. For instance, if Belgium were to request the United States to make available certain arrival and departure records maintained by the Immigration and Naturalization Service concerning aliens, there would be no basis or necessity for involving a court.

36. Of course, nothing in the Treaty could require a court to execute a request when doing so would be contrary to the Constitution of the United States. See Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). This provision is also favorable for the United States inasmuch as it gives greater assurance that a Belgian court will not refuse assistance.

37. Signed at The Hague on June 12, 1981, TIAS 10734 (entered into force September 15, 1983).

38. The United States Court of Appeals for the Second Circuit has ruled that in order for a court to execute a foreign request for evidence the requirement of 28 U.S.C. 1782 that the evidence be for use before a tribunal in that foreign state is to be applied strictly such that assistance could not be granted on behalf of an administrative agency. Fonseca v. Blumenthal, 620 F.2d 322 (2nd Cir. 1980); In Re Letters Rogatory Issued by the Director of Inspection of the Government of India, 3815 F.2d 1016 (2nd Cir. 1976).

39. See note 38, supra.

40. By published regulations, the Attorney General has delegated his authority under such treaties to the Assistant Attorney General for the Criminal Division, who, in turn, has redelegated the authority to the Deputy Assistant Attorneys General, Criminal Division, and the Director of the Office of International Affairs. 28 C.F.R. 0.64-1 and Directive No. 81 (44 FR 18661, March 29, 1979, as amended at 45 FR 6541, Jan. 29, 1980; 48 FR 54595, December 6, 1983).

41. This form is to be used to establish chain of custody of articles seized pursuant to Article 8 and is included in the Treaty.

ENDNOTES

42. This form is intended for use in connection with 18 U.S.C. 3505 records. It is not included in the Treaty.

43. This form is to be used primarily in connection with Article 5 of this Treaty, Providing Records of Government Offices or Agencies. It is not included in the Treaty.

Senate of the United States

IN EXECUTIVE SESSION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty between the United States of America and the Kingdom of Belgium on Mutual Legal Assistance in Criminal Matters, signed at Washington on January 28, 1988.

ADDITIONAL VIEWS OF SENATOR JESSE HELMS

During consideration of the Genocide Convention in 1985, the Foreign Relations Committee adopted a reservation aimed at protecting the constitutional rights of Americans. Unless a similar reservation is attached to this treaty, the constitutional rights of Americans will unnecessarily be left at risk.

This treaty seeks to enhance national and international law inforcement interests and aims to overcome the alleged burdens placed upon governments attempting to control interstate criminality.

The treaty seeks to allow U.S. prosecutors to obtain some assistance from foreign countries in obtaining evidence, and other matters, of importance to prosecutions.

But this treaty also seeks to help foreign governments obtain evidence for their prosecutions. Other countries have different systems of law. And the Constitution of no other country protects the rights and freedoms of its citizens as does the United States Constitution.

Other countries could demand evidence from the U.S. that would not be admissible in our own courts under our Constitution. Or they could seek U.S. evidence relating to persons in their own countries just to see how much we know.

So the question is this: Will this Treaty unintentionally result in an infringement upon the Constitutional rights and freedoms of American citizens.

As these treaties are currently drafted, we can be certain there will be a full scale assault against American liberties. The group of lawyers most concerned with protecting the rights of U.S. citizens in courts abroad—the International Legal Defense Counsel—strongly opposed enactment of these treaties "as it" in hearings of the Senate Foreign Relations Committee.

Mr. Chairman, there is a dispute among scholars as to whether or not the Constitution of the United States supersedes treaties in all instances. Nor have the courts settled this issue. The State Department has cited *Reid* v. *Covert,* 3454 U.S. 1 (1956), as standing for the proposition that the Constitution always prevails where a case concerns matters both within the territorial boundaries of the United States or in foreign lands.

Yet, such an interpretation misreads the *Reid* v. *Covert* holding. This case holds only that executive agreements consummated by the President without advice and consent of the Senate must conform to the Constitution in all circumstances. Treaties, however, are not executive agreements; indeed treaties are another matter.

As the distinguished justice and legal scholar, John Marshall Harlan III, wrote in his concurring opinion in *Reid* v. *Covert,* "I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to Amer-

ican citizens in every part of the world. * * * The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place." (Harlan, J., concurring, at 74).

Furthermore, in *Missouri* v. *Holland,* 252 U.S. 416 (1920), Justice Holmes suggested that there is no substantive limit to the treaty-making power. In *Ware* v. *Hylton,* 3 Dall. 199, 284 (1976) Justice Cushing wrote that the "Treaty * * * is of equal force with the Constitution.

I wish it were the case that the Supreme Court had conclusively determined that the Constitution is supreme in all cases. But since this determination has not been made, a reservation is necessary to assure that Constitutional rights of Americans are not abridged by the execution of these treaties.

For those who hold the view that the Supreme Court has held that the Constitution supersedes a treaty, then these reservations merely confirm their beliefs. However, if that view is wrong; this reservation will save the day.

In addition, under Article 27 of the Vienna Convention on the Law of Treaties—which the State Department perceives as customary international law—no state may "invoke the provisions of its internal law as justification for failure to perform a treaty." So even if we all agree that the Constitution—our fundamental internal law—takes precedence, international law seems to be pointing in the other direction.

Indeed, this possibility that the United States might be found in default of international obligations was a major factor in the Committee's approval of the Constitutional Reservation to the Genocide Convention.

As the Committee Report on the Genocide Convention stated:

> (t)he problem is that international law does not recognize the Constitution as supreme.
>
> Article 27 of the Vienna Convention on the Law of Treaties, which represents customary international law on this point, provides that no state may 'invoke the provisions of its internal law as justification for its failure to perform a treaty'.
>
> Thus, without the Committee's recommended reservation, were a conflict to arise between the requirements of the Constitution and those of the Convention, the United States might be found to be in default of its international obligation.

Just as was the case with the Genocide Convention, a reservation is necessary for this Mutual Legal Assistance Treaty to assure that if a conflict arises between the requirements of the Constitution and those of the Treaty, the United States will not be found to be in default of its international obligation. That is why a reservation is necessary to make the supremacy of the Constitution a part of the Treaty itself and therefore enforceable.

Specifically, the Senate should add a reservation identical to the Lugar-Helms reservation added to the Genocide Convention. It simply provides that:

> Nothing in this Treaty requires or authorizes legislation or other action by the United States prohibited by the U.S. Constitution as interpreted by the United States.

Such a proposal would constitute what some would call a category II amendment. It would be included in the instruments of ratification exchanged with the other countries, yet would require no renegotiation. The other party would simply accept it by ratification, and the constitutional rights of Americans would be secure.

JESSE HELMS.

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